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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SEVERO PASILLAS,

Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

Appellee.

On Appeal from the California Court of Appeal, First Appellate District, Division Two

JURISDICTIONAL STATEMENT

ROBERT F. GORE, Esquire
Counsel of Record
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

A. ROGER JEANSON, Esquire
Haas & Najarian
530 Jackson Street, Suite 303
San Francisco, California 94133
(415) 788-6330

Attorneys for Appellant

November 6, 1984

QUESTIONS PRESENTED

This is a labor case challenging the constitutionality of the union-security provision of the California Agricultural Labor Relations Act. This provision is *unique* in American labor law and authorizes collective-bargaining agreements requiring California farmworkers either to become actual members of the labor union and satisfy all *reasonable* terms of membership or to lose their jobs. The California Court of Appeal—in enforcing the decision of the State Agricultural Labor Relations Board—held that there was insufficient "governmental action" to subject the statute to constitutional scrutiny. The California Supreme Court declined review. The issues on appeal are:

QUESTION 1

Whether there is sufficient "governmental action" for constitutional review when a STATE LEGISLATURE enacts a comprehensive statute covering agricultural labor relations and that statute:

* creates a STATE AGENCY to oversee and enforce the statute,

* grants farmworkers the right to refrain from joining or supporting a labor union, but

* authorizes labor unions, if certified by the STATE AGENCY, to require farmworkers—as a condition of continued employment—to satisfy all "reasonable" terms and conditions of union membership, and

* authorizes the STATE AGENCY to determine, on a case-by-case basis; which terms and conditions of union membership are "reasonable."

QUESTION 2

Whether the union-security provision of California Labor Code § 1153(c)—authorizing agreements requiring full union membership as a condition of continued employment—deprives farmworkers of their right to freedom of association and equal protection of the laws in violation of the Constitution of the United States.

PARTIES

Appellant's case before the California Court of Appeal was consolidated with other petitions for review of Agricultural Labor Relations Board decisions. In addition to the parties named in the caption, the following parties/persons participated in the proceedings before the Court of Appeal:

Maria Guadalupe Navarro,	a California farmworker
Otis Scarbrough (deceased)	a California farmworker
Pacific Legal Foundation, Inc.	Navarro/Scarbrough's counsel
Sun Harvest, Inc.	an agricultural employer
United Farm Workers of America	a labor organization

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On Appeal from the California Court of Appeal, First Appellate District, Division Two

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JURISDICTIONAL STATEMENT

Severo Pasillas appeals from that part of the final judgment of the California Court of Appeal which holds that there is insufficient "governmental action" to subject the union-security provision of the California Agricultural Labor Relations Act (ALRA) to constitutional scrutiny as being violative of the Constitution of the United States.

OPINIONS BELOW

The final judgment of the California Court of Appeal being appealed is reported at 156 Cal. App. 3d 312, 202 Cal. Rptr. 739 (1984) and is attached hereto as Exhibit A. The underlying decision and order of the California

Agricultural Labor Relations Board is reported at 8 ALRB No. 103 (1982) and is attached hereto as Exhibit B. The unreported orders of the California Court of Appeal and California Supreme Court denying rehearing and hearing, respectively, are attached hereto as Exhibits C and D.

JURISDICTION

This is an appeal from a final judgment entered by the California Court of Appeal enforcing a decision of the California Agricultural Labor Relations Board (ALRB) upholding Senor Pasillas' discharge pursuant to a union-security clause sanctioned by the ALRA. Following his discharge, Senor Pasillas filed multiple unfair labor practice charges against his employer and the United Farm Workers union. Notwithstanding the fact that the California Constitution precludes administrative agencies from deciding constitutional issues,[1] two of appellant's unfair labor practice charges (Exhibits F and G) specifically challenged the constitutionality of the "membership in good standing" requirement sanctioned by California Labor Code § 1153(c). Although the ALRB dismissed these "constitutional" charges, Senor Pasillas continued to assert his constitutional claims throughout administrative proceedings on his other unfair labor practice

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[1] Section 3.5 of Article 3 of the Constitution of the State of California provides in pertinent part:

> An administrative agency . . . has no power:
>
> * * * *
>
> (c) to declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law . . . prohibit[s] the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law.

charges. Both the Administrative Law Officer and the ALRB addressed the constitutional issues in their decisions. App. B, *infra*, p. 51a.

Senor Pasillas' petition to review the ALRB decision reasserted his constitutional claims and the issue was fully briefed and argued in the Court of Appeal.[2] The

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[2] *Concurrent Federal Litigation.* After over three years of prolonged and drawn-out state judicial and administrative proceedings, the appellant joined other California farmworkers in *federal* civil rights litigation challenging, *inter alia*, the constitutionality of Labor Code § 1153(c). *Beltran v. California*, S.D. Cal., Case No. 83-0722 JLI(I). In December, 1983 the federal court held that: the plaintiffs "had been on a legal merry-go-round"; that there was sufficient governmental action to subject Labor Code § 1153(c) agreements to constitutional scrutiny; and that abstention was inappropriate. The case was set for trial in three months. Shortly thereafter, the California Court of Appeal granted appellant's petition to review the ALRB decision and set the case for oral arguments the following month.

During oral arguments at the state Court of Appeal, counsel for the appellant made it clear that the *federal* court would decide the constitutional claims. At the close of oral arguments in the Court of Appeal, the Presiding Judge requested that counsel notify the *federal* court that the case had been submitted and that it desired the federal court to abstain. The federal district court then took the case off-calendar pending a decision by the California Court of Appeal. In June of 1984, following the decision of the Court of Appeal, the federal district court heard arguments on whether it should continue to abstain. The district court reiterated its prior holdings that there was sufficient governmental action and that abstention was inappropriate. In August of 1984, the district court heard arguments on the merits of plaintiffs' constitutional claims. A decision in that case is expected at any time.

In his petition for hearing by the California Supreme Court, the appellant specifically reserved his right to have his *federal* constitutional claim decided by a *federal* court. *See England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964). Notwithstanding appellant's belief that he has properly preserved his rights to have his *federal* claims heard by a *federal* court, this appeal is considered prudent in light of Justice Douglas' concurring remarks in *England. Id.*, at 423-37.

May 24, 1984 judgment being appealed held that there was insufficient "governmental action" to subject union-security discharges to constitutional scrutiny. App. A, *infra*, p. 29a. Senor Pasillas' timely application for rehearing on the federal constitutional issue was denied by the Court of Appeal on June 20, 1984. App. C., p. 80a. The Supreme Court of California denied his timely petition for hearing by a notice entered on August 8, 1984. App. D., p. 82a. A notice of appeal to this Court was filed on November 1, 1984. App. E, p. 84a.

This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1257(2). Because the California Supreme Court denied Senor Pasillas' petition for hearing, the Court of Appeal is the highest court in California in which a decision could be had. *Abood v. Detroit Board of Education*, 431 U.S. 209, 216 (1977). Jurisdiction lies under 28 U.S.C. § 1257(2) where a state court rejects a contention that a state statute as applied is repugnant to the Constitution of the United States. *E.g., Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1979); *Standard Oil Co. v. Johnson*, 316 U.S. 481, 482-83 (1942).

Alternatively, appellant would point out that jurisdiction would also be appropriate by way of writ of certiorari pursuant to 28 U.S.C. § 1257(3).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellant asserts that the union-security provision of the California Agricultural Labor Relations Act (ALRA),

Cal. Labor Code §§ 1140-1166, violates his federal constitutional rights. The pertinent sections of the ALRA are:

§ 1152 - *Rights of Agricultural Employees*

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of § 1153.

§ 1153 - *Employer Unfair Labor Practices*

> It shall be an unfair labor practice for an agricultural employer to do any of the following:
>
> (a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in § 1152.
>
> * * * *
>
> (c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization.
>
> Nothing shall preclude an agricultural employer from making an agreement with a labor organiza-

tion . . . to require as a condition of employment, membership therein . . . . [M]embership shall mean the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing; provided, that such membership shall not be denied or terminated except in compliance with a constitution or bylaws which afford full and fair rights to speech, assembly, and equal voting and membership privileges for all members, and which contain adequate procedures to assure due process to members and applicants for membership.

§ 1154 - *Union Unfair Labor Practices*

It shall be an unfair labor practice for a labor organization or its agents to do any of the following:

(a) To restrain or coerce:

(1) Agricultural employees in the exercise of the rights guaranteed in § 1152. This paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of members therein.

* * * *

(b) To cause or attempt to cause an agricultural employer to discriminate against an employee in violation of subdivision (c) of § 1153, or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated for reasons other than failure to satisfy the membership requirements specified in subdivision (c) of § 1153.

The First Amendment to the Constitution of the United

States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Legislative Background. Agricultural employees are specifically excluded from the coverage of the National Labor Relations Act (NLRA), 29 U.S.C. § 152(3), and until 1975, the rights and privileges of California farmworkers were governed by the common law of California which had been construed to authorize labor unions and employers to enter into "closed shop" agreements.[3]

In 1975, the State of California enacted a comprehensive statute governing labor-management relations in the agricultural industry. This statute was modeled after the post-1947 NLRA and, like its federal counterpart, provides that agricultural employees have the "right to

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[3] *See, e.g., Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 361 (1949) (a pre-Taft-Hartley case); *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1945).

refrain" from joining or supporting a labor union unless there is a union-security agreement in effect between the employer and the union "certified" as the exclusive bargaining representative. As initially introduced, the union-security provision of the proposed statute defined "membership" in terms similar to the NLRA, i.e. the membership requirement was limited to the payment of initiation fees and dues. 29 U.S.C. § 158(a)(3). However, during compromise negotiations which were not open to the public, the ALRA's definition of membership was changed to its present language, i.e. "the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing." It was enacted into law as amended. Cal. Lab. Code § 1153(c). It is important to note that the union-security provision of the ALRA has a disparate impact on people of Hispanic origin who make up the vast majority of farmworkers in the State.[4]

In this regard, it should also be noted that although California has enacted other labor laws, those laws only authorize union-security agreements which condition continued employment on financial support of the bargaining agent. *See* Cal. Govt. Code § 3502.5 (City & County employees); Cal. Govt. Code § 3517.7 (State employees); Cal. Govt. Code § 3540.1(i) (Educational employees); and Cal. Govt. Code § 3583 (Higher Education employees). The union-security provision of Labor

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[4] Although not a part of the record in the proceedings below, the Court is requested to take judicial notice of the 1980 census which indicates that although Hispanics account for only 16.7 percent of the California workforce, they account for over 70 percent of the California farmworkers. *See Report 5: Equal Employment Indicators, 1980 Census of Population, California*, prepared by Region IX, Employment and Training Administration, U.S. Department of Labor.

Code § 1153(c) is *unique* in American labor law and is the only statute authorizing agreements conditioning continued employment on becoming and remaining on actual member of a labor union.

Factual Background. In 1975, following the enactment of the ALRA, the newly created ALRB held an election at Sun Harvest, Inc. (Sun Harvest) and certified that the United Farm Workers of America (UFW) was the exclusive representative of the farmworkers employed by Sun Harvest. Following this election Sun Harvest and the UFW entered into a collective-bargaining agreement containing a union-security provision authorized by Labor Code § 1153(c).[5]

In 1976, Senor Pasillas went to work for Sun Harvest and joined the union as required by the collective-bargaining agreement. In December of 1978, the UFW/Sun Harvest collective-bargaining agreement (including the union-security provision) expired. In January of 1979, the UFW commenced an economic strike against Sun Harvest and other agricultural employers throughout California. In September of 1979, after a strike of seven and one-half months, Sun Harvest and the UFW executed a new collective-bargaining agreement containing a similar union-security provision. During the strike there was no union-security agreement in effect.

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[5] Article 2 (UNION SECURITY) of the Sun Harvest/UFW collective-bargaining agreement provided:

> Union membership shall be a condition of employment. Each worker shall be required to become a member of the Union . . . and to remain a member of the Union in good standing. Union shall be the sole judge of good standing of its members. Any worker . . . who has been determined to be in bad standing by the Union . . . shall be immediately discharged . . . upon written notice from the Union . . ..

From 1976 until the time of his discharge in November of 1979, Senor Pasillas worked as a celery packer for Sun Harvest in the Oxnard and Salinas areas of California. The Oxnard celery season usually begins in January and ends in June, while in Salinas it begins in June and lasts through December. By working for six months in Oxnard and then moving to Salinas for the next six months, Senor Pasillas could work throughout the year as a celery packer for Sun Harvest. In December of 1978, the appellant decided not to move to Oxnard for the celery season there. His wife was pregnant and having a difficult time. He did not want to move her and could not afford to leave his family in Salinas while he lived in Oxnard. Thus, from January to June 1979 — during the UFW strike — the appellant remained in Salinas and cared for his children and pregnant wife.

By the time the Salinas celery season commenced in June of 1979, the Pasillas family was in desperate financial straits. Senor Pasillas needed money to cover his wife's medical expenses and to pay overdue federal income taxes. He contacted the State employment service and was told that there were jobs available at Sun Harvest. He crossed the picket line and returned to work. The UFW Constitution does not provide for resignation, and the appellant was unaware that he could resign from the UFW and avoid union discipline. Although the UFW was aware that he had crossed the picket line in June, it did not file any disciplinary charges against him until after the strike was settled— some three months after he initially crossed the picket line.[6]

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[6] The UFW Constitution required that charges against members be dismissed *unless* they were filed within 60 days from the time the Accuser first became aware of the violation. UFW const., art. XVIII, §§ 4,5.

On September 4, 1979 the UFW and Sun Harvest settled the strike and executed a new contract containing a union-security provision. Later that month the UFW served Senor Pasillas with a Formal Complaint and Notice of Trial. The appellant did not attend his trial, at which he was convicted of strikebreaking and expelled from the union. Although he was served with notice of the Trial Committee's decision, Senor Pasillas did not appeal his conviction to UFW's National Executive Board or Public Review Board. During this period, the appellant was *not* represented by legal counsel and was unaware of the possible consequences of not appealing the trial decision. When his time to appeal expired, the UFW notified Sun Harvest that the appellant was no longer a member in good standing and demanded his discharge pursuant to the union-security agreement. Sun Harvest complied.

Procedural Background. Senor Pasillas went to the ALRB and filed an unfair labor practice charge against the UFW. He subsequently retained free legal counsel who filed additional charges against both the UFW and Sun Harvest. Although the ALRB's General Counsel issued a complaint alleging that the appellant had been denied due process during his union trial, the unfair labor practice charges challenging the constitutionality of Labor Code § 1153(c) were dismissed.

In April of 1981 Senor Pasillas' complaint was heard before an Administrative Law Officer (ALO) of the ALRB. The issues presented were: whether the union-security provision violated his constitutional rights; whether his failure to exhaust the union's appeal procedures precluded ALRB review; whether the new union-

security agreement could be retroactively applied; and whether he was denied due process during the union trial. The ALO's decision held that the statute was constitutional, that appellant did not have to exhaust his union remedies, and that the union deprived the appellant of due process by failing to keep a faithful and accurate record of the trial.[7] Accordingly, he ordered that the appellant be reinstated to his job and made whole for all economic losses.

All of the parties sought review of those portions of the ALO decision which were unfavorable to their positions. The same issues were reargued before the ALRB. In December of 1982, the ALRB issued its decision dismissing appellant's complaint for failure to attend his trial and exhaust internal union remedies. The ALRB went on to hold that although it did not have the authority to rule on the constitutionality of the statute, it believed that the statute was constitutional. App. B, p. 52a. The remainder of appellant's claims were held to be without merit.

Senor Pasillas filed a timely petition for review with the California Court of Appeal reasserting all of the claims he had made in the administrative proceedings. In its decision, the Court of Appeal refused to decide

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[7] The Administrative Law Officer's holding on this issue stated:

"Article 19, § 6 of the UFW Constitution provides that "a faithful and accurate record of the proceedings shall be made." The record of Pasillas' trial [record citations omitted] is deficient in several respects: it does not summarize the testimony of Pedro Guerra, the sole witness against Pasillas; and it fails to state what "evidence" was considered by the Ranch Committee. In fact, the record is misleading in that it gives the impression that Pasillas was present, when he did not even appear for his trial." 8 ALRB No. 103, ALO Decision at 37-38.

appellant's *federal* constitutional claim on the ground that there was insufficient governmental action to subject Labor Code § 1153(c) agreements to constitutional scrutiny. App. A, p. 27a. The Court of Appeal went on to uphold the ALRB's rulings on all other state labor law issues. Appellant's timely petition for rehearing by the Court of Appeal was denied, as was his petition for hearing in the Supreme Court of California. App. C and D. Appellant now urges this Court to hear his appeal.

REASONS WHY THE APPEAL IS NECESSARY

The Question of Governmental Action. As a matter of substantive constitutional law, the governmental action requirement is the judicial recognition of the fact that most rights secured by the Constitution are protected only against infringement by governments. Careful adherence to the "governmental action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. In this appeal, Senor Pasillas does not challenge the actions of his employer or the union—these private parties did nothing more than negotiate and enforce a union-security agreement sanctioned by State law. It is the appellant's position that the statutory system enacted by the State Legislature, signed into law by the Governor of the State, and enforced by the State's administrative agencies and courts, impermissibly infringes on his federal constitutional rights.

As this Court pointed out in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744 (1982):

> "While private misuse of a state statute does not describe conduct that can be attributed to the state,

> the procedural scheme created by the statute obviously is the product of state action."

Id. at ____, 102 S. Ct., at 2756 (emphasis supplied). When California enacted the ALRA, it: 1) gave farmworkers the "right to refrain" from joining or supporting a labor union (a right they did not possess under the common law); 2) created a State agency and gave it the power to certify labor unions as exclusive bargaining representatives (a grant of monopoly power); 3) authorized *certified* labor unions to negotiate away the farmworkers' statutory "right to refrain"; 4) gave the State agency the power to decide which terms and conditions of union membership were "reasonable" under the statute; and 5) provided for judicial review by the State courts. The State created this statutory scheme and each element of it was involved in this case. It is respectfully submitted that the California Court of Appeal erred in holding that there was insufficient governmental action to allow constitutional scrutiny of the statute.

The Court of Appeal also misconstrued prior holdings of this Court discussing "governmental action" in the union-security context. *See e.g., Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Clerks v. Allen*, 373 U.S. 113 (1963); and *Abood, supra.* In *Hanson*, this Court found governmental action in the provision of the Railway Labor Act which expressly authorized union-security agreements. 351 U.S., at 232. The follow-on cases of *Street* and *Allen* did not disturb this finding of governmental action. In *Abood* the Court clarified the governmental action holding in *Hanson* by stating that "[n]othing in our opinion . . .

indicates that private collective-bargaining agreements, *are without more*, subject to constitutional constraints." 431 U.S., at 226 n.23 (emphasis supplied). The Court stressed, however, that "[t]he Plaintiffs' claims in *Hanson* failed, not because there was no governmental action, but because there was no First Amendment violation." *Id.*, at 226. It is the appellant's position that this case certainly involves "something more" than just the negotiation and enforcement of a private collective-bargaining agreement — it involves the enactment and enforcement of a statutory scheme which deprived the appellant of fundamental rights guaranteed by the Constitution of the United States.

Although the Court of Appeal noted that this Court's recent decision in *Ellis v. Railway Clerks*, 104 S.Ct. 1883 (1984), "pose[d] conceptual difficulties as regards state action," App. A, p. 19a, the court went on to ignore the *Ellis* decision on the ground that the parties (or this Court *sua sponte*) failed to recognize or preserve the issue. It is respectfully submitted that the parties (and this Court) failed to discuss the issue because it was already settled.

In its decision, the Court of Appeal also noted that there was a split of authority in the federal courts over whether union-security agreements negotiated pursuant to the NLRA were subject to constitutional scrutiny. App. A, p. 20a. *Compare Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410 (10th Cir. 1971) (the federal government has not "so far insinuated itself into the decision of a union and an employer to agree to a union security clause so as to make the choice governmental action."); *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir.

1983) (indirect action of the government in authorizing union-security agreements under the NLRA did not sufficiently involve the government to trigger First Amendment scrutiny) *with Linscott v. Miller Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971) (union-security cases arising under the NLRA are indistinguishable from RLA cases like *Hanson*); *Havas v. Communications Workers*, 509 F. Supp. 144 (N.D.N.Y. 1981) (same reasoning as the First Circuit in *Linscott*). The Second Circuit expressly refused to reach the issue in *Buckley v. AFTRA*, 496 F.2d 305, 310 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974) and the Ninth Circuit failed to discuss the issue in either *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1003-04 (9th Cir. 1970) or *Ellis v. Railway Clerks*, 685 F.2d 1065 (9th Cir. 1982), *rev'd in part on other grounds, aff'd in part*, 104 S.Ct. 1883 (1984). Although these cases involve a different statute and less government involvement, they do indicate the need for the Court to clarify the governmental action requirement in the union-security context.

From the foregoing it is apparent that the California Court of Appeal misconstrued and ignored the prior "governmental action" holdings of the Court and thereby deprived the appellant (and other California farmworkers) of a forum to hear that constitutional claim. Accordingly, it is respectfully submitted that the Court should note probable jurisdiction and set this case for argument.

The Union-Security Provision Of Labor Code § 1153(c) Deprives The Appellant Of Fundamental Rights Guaranteed By The Constitution. For over six years, California farmworkers have been trying to have some court, any court, hear their claims that union-security

agreements negotiated pursuant to Labor Code § 1153(c) violate their federal constitutional rights. To date they have not been successful. The appellant did not become involved until 1980, but nonetheless he has been denied a meaningful forum for over four years. Assuming that the Court finds sufficient governmental action to subject Labor Code § 1153(c) agreements to constitutional scrutiny, the appellant urges the Court to go to the merits and *finally* resolve whether such agreements violate his constitutional rights to freedom of association and equal protection of the laws.

Although the California Court of Appeal did not reach the constitutional question, the prior holdings of this Court regarding freedom of association make it abundantly clear that union-security agreements authorized by Labor Code § 1153(c) cut too deeply in the associational freedoms of California farmworkers. It is, of course, settled that among the panoply of individual rights protected by the First Amendment is freedom of association. See e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Abood, supra*, 431 U.S., at 233 (and cases cited thereat).

Although less commonly conceived, freedom of association includes the converse—the freedom *not* to associate, the right *not* to be compelled to join a group or association against one's will, and the right *not* to be required to associate with groups holding views which an individual finds to be repugnant to his beliefs. "Freedom of association therefore plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 104 S.Ct. 3244, 3252 (1984); Cf. *Minnesota State Board for Community Colleges v. Knight*, 104 S.Ct. 1058, 1079

(1984) (STEVENS, J., dissenting); *Abood, supra*, 431 U.S., at 234-235. The right to associate and the right not to associate are thus complimentary aspects of the broader freedom subsumed by the concept of liberty.

Although the right to associate is a fundamental right protected by the First Amendment, it is not absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests that cannot be achieved through means significantly less restrictive of associational freedoms. *Roberts, supra*, 104 S.Ct., at 3252 (and cases cited thereat). In both *Abood* and *Ellis*, the Court acknowledged that compelled financial support of a labor union pursuant to a union-security agreement impinged on the associational rights of dissenting employees, but justified this *minimal* intrusion by the governmental interest in maintaining labor peace and avoiding the "free-rider" problem. The Court did, however, limit compelled financial support to those union expenditures which were necessary for the union to perform its responsibilities as the bargaining representative.

Unlike the union-security clauses which have already been before the Court, the agreements authorized by Labor Code § 1153(c) do not limit the loss of associational freedom to financial support of the labor union. Under the terms of this statute, farmworkers can be compelled to "satisfy all reasonable terms and conditions uniformly applicable to other members in good standing."

This statute has a "chilling effect" on farmworkers' associational rights because the only way they can determine the reasonableness of any "term or condition

of membership" is to be disciplined by the union, exhaust the internal union remedies, and then seek a determination of reasonableness through unfair labor practice proceedings before the ALRB. Even then it is discretionary with the ALRB as to whether it will issue a complaint. As this case aptly demonstrates, such procedures may take years; and if the unsuspecting farmworker should happen to make a procedural mistake, his entire way of life may be destroyed.

These factors, when combined with the fact that this unique labor law has a disparate impact on Hispanics, make this case appropriate for immediate review. Quite clearly, California has singled out one class of citizens — Hispanic farmworkers — and imposed upon them a most onerous burden. They are the *only* employees in this country that may be compelled, under color of state or federal law, to actually join a labor organization in order to retain a job. To the farmworkers who have suffered under this burden for almost ten years, it does not matter whether the case is treated as a loss of associational freedom, a denial of equal protection, or an abidgement of privileges and immunities. What is important to them is the fact that finally someone will hear their pleas.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction of the appeal and set it down for plenary briefing and argument. In the alternative, the Court should grant a writ of certiorari pursuant to

28 U.S.C. § 1257(3) and set the case for argument.

Respectfully submitted,

ROBERT F. GORE, Esquire
Counsel of Record
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

A. ROGER JEANSON, Esquire
Haas & Najarian
530 Jackson Street, Suite 303
San Francisco, California 94133
(415) 788-6330

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Attorneys for Appellant

APPENDIX A

Pertinent Extracts of the Opinion and Judgment of the California Court of Appeal First Appellate District, Division Two*

* The Court of Appeals issued an 83-page decision in these five consolidated cases. For the sake of brevity, only those pages pertinent to this appeal have been reproduced in this appendix. The entire decision can be found at 156 Cal. App. 3d 312, 202 Cal. Rptr. 739, ____ P.2d ____ (1984).

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION TWO

SEVERO PASILLAS,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS

Respondent,

A021137
(8 ALRB No. 103)

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO and SUN HARVEST, INC.,

Real Parties in Interest.

Consolidated with A021199 (8 ALRB No. 103), A021200 and A021202 (8 ALRB No. 104), and A022544 (9 ALRB No. 17)

In these consolidated cases, we consider the extent of a union's authority under the Agricultural Labor Relations Act (Lab. Code, § 1140 et seq., hereinafter ALRA or the Act)[1] to compel a worker's discharge from employment, pursuant to a "union security" provision of a collective bargaining agreement, for the worker's failure to maintain union membership in good standing. We granted the petitions of Severo Pasillas, Maria Navarro and the United Farm Workers of America (UFW or Union) to

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[1] All subsequent section references are to the Act unless otherwise indicated.

review the decisions of the Agricultural Labor Relations Board (ALRB or Board) in three related cases arising out of the Union's suspension or expulsion of four member workers for crossing picket lines to work during 1979 strikes called after expiration of prior collective bargaining agreements but before new agreements had been reached. Pursuant to union security provisions in the new agreements, the workers were fired by their employers at Union request.

BACKGROUND

Petitioners Pasillas and Navarro, along with two other workers, Juan Martinez and Odis Scarbrough, were all UFW members in good standing and were working for employers who were parties to collective bargaining agreements containing union security provisions. In December of 1978, those agreements expired without new agreements having been reached.[2] Navarro worked as a lettuce wrapper for Growers Exchange, Inc. (sometimes called the El Toro Company); Martinez worked as a broccoli cutter for Mann Packing Company, Inc.; and Scarbrough worked as a tractor driver for Sun Harvest, Inc. (formerly InterHarvest, Inc.), which was also Pasillas' most recent employer. (See fn. 2, *ante*.)

In January 1979, the UFW called strikes at Sun Harvest, Inc. (Sun Harvest) and Growers Exchange, Inc. (Growers Exchange). There were occasional work stoppages at Mann Packing Company, Inc. (Mann Packing),

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[2] Petitioner Pasillas, who had been working as a celery packer for Sun Harvest, Inc., elected not to travel south for the company's Oxnard celery season and so was not employed beyond the end of the Salinas celery season, which lasts from June to December.

Martinez's employer, but no formal strike was called. Pasillas, Navarro and Scarbrough each initially respected the strikes but later crossed picket lines and returned to work before the strikes were settled. Martinez joined in all work stoppages at Mann Packing but was later accused of having crossed picket lines to work at Growers Exchange. None of the workers sought to resign from union membership.

The strikes against Sun Harvest and Growers Exchange were settled, and new collective bargaining agreements were signed with all three employers (including Mann Packing) in September and December of 1979. Each new agreement contained a union security provision which conditioned a worker's employment on his maintaining union membership in good standing.[3] The four workers continued working for their respective employers after the new contracts took effect.

Thereafter, each worker was charged with violating

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[3] The three union security provisions are nearly identical. The one in the Sun Harvest agreement reads as follows: "Union membership shall be a condition of employment. Each worker shall be required to become a member of Union immediately following five (5) continual days after the beginning of employment, or five (5) days from the date of the signing of this Agreement, whichever is later; and to remain a member of the Union in good standing. Union shall be the sole judge of the good standing of its members. Any worker who fails to become a member of the Union within the time limit set forth herein, or who fails to pay the required initiation fee, periodic dues or regularly authorized assessments as prescribed by Union, or who has been determined to be in bad standing by the Union, or who has been determined to be in bad standing by the Union pursuant to the provisions of the Union's constitution, shall be immediately discharged or suspended upon written notice from the Union to the Company [Sun Harvest], and shall not be re-employed until written notice from the Union to the Company of the worker's good standing status."

union prohibitions against strikebreaking[4] and each was found guilty as charged in separate disciplinary proceedings. The discipline imposed was a two-year suspension of Navarro's membership and outright expulsion for the others. By successful internal appeals to the UFW's National Executive Board (NEB), Scarbrough and Martinez had their expulsions reduced to two-year and one-year suspensions, respectively. An attempted appeal by Navarro was rejected by the NEB as untimely, and Pasillas did not file an appeal. Following each worker's suspension or expulsion — and NEB appeal, if any — notice of each worker's "bad standing" was given to his or her employer, and the workers were thereupon terminated from employment pursuant to the union security provisions in the new collective bargaining agreements.

Only Scarbrough proceeded to the next internal union appeal level, the Public Review Board (PRB).[5] Finding that the Union had failed to demonstrate the member-

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[4] Each was charged under the following sections of the UFW's Constitution (UFW Constitution), article XVIII:

> "Section 1: Any member of the Union may prefer charges against any other member of the Union for:
> "....
> "(b) violating any provision of this Constitution;
> "....
> "(dd) working without Union authorization during the period of an approved strike for a Ranch which is being struck by the Union;
> "(ee) crossing an authorized Union picket line; . . ."

We additionally note that Article XVII of the UFW Constitution, delineating obligations of membership, provides in section 4 that "Every member shall respect Union picket lines, for there is nothing lower than a strikebreaker."

[5] An appeal from a trial resulting in any disciplinary action lies to the

ship of persons voting at Scarbrough's trial and had failed to provide a complete trial record, the PRB overturned both the trial and NEB decisions and restored Scarbrough to full union membership. Due to delay caused largely by the apparent loss of Scarbrough's first PRB appeal notice filed in May 1980, the PRB decision and Scarbrough's subsequent reinstatement did not occur until May 1981.

Meanwhile, Scarbrough and the other workers each challenged his or her discharge by filing unfair labor practice charges against the Union (§ 1154, subds. (a)(1) and (b)). Pasillas and Martinez filed charges against their employers as well (§ 1153, subds. (a) and (c)). The Board ordered the charges of Pasillas, Scarbrough and Martinez consolidated, and Navarro's case proceeded separately.

Hearings on the consolidated cases were held in April of 1981 before an Administrative Law Judge (ALJ), and the ALJ's written decision was filed on the following October 9th. The ALJ concluded that, although the Union had power to suspend and hence cause the discharge of its members for strikebreaking, each charging party had been denied due process in the course of the disciplinary proceedings. The discharges were therefore held improper and all unfair labor practice charges were

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NEB if taken within 15 days of the date of trial (or longer if the NEB determines that the interests of justice are served by an extension of up to 30 days). An NEB appeal stays enforcement of penalties pending its resolution. (UFW Const., art. XX, §§ 1(a), 1(b), 1(d).) In cases involving suspension or expulsion where the NEB upholds the trial action, further review is available by appeal to either the PRB or the first Convention following the NEB decision. Unlike the NEB appeal, however, this further review does not stay the suspension or expulsion. (UFW Const., art. XX, § 2.)

sustained. The ALJ ordered make-whole remedies. retroactive union membership in good standing and immediate offers of reinstatement for all charging parties.

On May 4, 1982, at a prehearing conference before an ALJ in Navarro's case, both sides waived an ALJ hearing and submitted the matter directly to the Board on stipulated facts and certain other documentary evidence. pursuant to Board regulation. (Cal. Admin., Code, tit. 8, § 20260.)

Board review of the ALJ decision in the consolidated cases of Pasillas, Scarbrough and Martinez culminated in a decision and order dated December 30, 1982. A majority of the Board upheld the ALJ's disposition as to Martinez, concluding that he was denied a fair hearing.[6] As to Scarbrough, the Board agreed with the ALJ that a September 1979 layoff caused by the Union constituted a violation of the Act. However, the Board dismissed allegations concerning his subsequent January 1980 discharge from employment in light of remedial actions already taken by the Union and declined to maintain jurisdiction over the matter. Portions of the consolidated complaint relating to Pasillas were dismissed by the Board for his failure to adequately exhaust internal union procedures.[7]

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[6] Board member Jerome Waldie, finding no procedural due process violations as to Martinez, would have dismissed those allegations.

[7] Board member John McCarthy dissented and evidently would have found violations of the Act as to all charging parties. He felt that, where the charge against a union member was strikebreaking, any discipline resulting in suspension or expulsion, and consequent loss of employment under a union security provision, was invalid where less restrictive disciplinary action would be effective in promoting union solidarity.

By a supplemental decision and order of April 15, 1983 (9 A.L.R.B. No. 17), the Board modified its prior decision as to Scarbrough after granting his motion for reconsideration. The Board reversed its position on the January 1980 discharge and accordingly issued a remedial order. Noting that Scarbrough had recently died, the Board ordered his estate entitled to backpay.

The Board issued its decision in Navarro's case (8 A.L.R.B. No. 104) on December 30, 1982, the same day as its decision in the consolidated cases. Concluding that the strikebreaking charges against Navarro were preferred well beyond the 60-day time period specified in the UFW Constitution (art. XVIII, § 4) and that extensions of time authorized by UFW President Cesar Chavez were ineffectual, the Board found a violation of Navarro's right to due process in the disciplinary proceedings and, due to the gravity of the violation, excused her failure to exhaust internal union procedures. The Board ordered retroactive restoration of union membership and reinstatement to employment, plus make-whole remedies.

On January 28 and 31, 1983, timely petitions were filed for review of the Board's two December 30, 1982 decisions. Pasillas and Navarro each petitioned in their respective cases, and the Union cross-petitioned in both cases (8 A.L.R.B. No. 103, 8 A.L.R.B. No. 104). Neither Martinez nor representatives of Scarbrough sought review. On May 16, the Union petitioned for review of the Board's supplemental decision of April 15, 1983 (9 A.L.R.B. No. 17). (§ 1160.8.) We denied respondent Board's motion to dismiss Navarro's petition (see fn. 12,

post). The five petitions were consolidated for review; we issued writs of review on January 18 and 26, 1984.

REVIEW

I

Preliminary to addressing several of the various issues presented herein, it is important to examine the language and history of the Act as it relates to the use of union security provisions.

The ALRA was enacted in 1975 to fill a long-standing void left by the National Labor Relations Act (NLRA) (29 U.S.C. § 151 et seq.),[1] which expressly excludes agricultural laborers from its definition of "employees." (NLRA, § 2(3) [29 U.S.C. § 152 (3)].) Our state Supreme Court has noted: "[T]he entire ALRA is designed to provide agricultural workers with protection of their collective bargaining rights comparable to that provided nonagricultural workers by the NLRA. To that end the ALRA was patterned after the NLRA, with changes necessary to meet special needs of California agriculture. [Citation] . . . [¶] The Legislature thus intended to adapt to California needs the proved federal instrumentality for protecting rights of employees and employers with respect to collective bargaining. [Citation]" (*Tex-Cal Land Management, Inc.* v. *Agricultural*

[1] Originally enacted in 1935 and commonly known as the Wagner Act, the NLRA, as amended in 1947 (Taft-Hartley Act), is now incorporated as part of the Labor-Management Relations Act (LMRA) (29 U.S.C. § 141 et seq.) but continues to be cited as the NLRA. (29 U.S.C. § 167.) This opinion will at times refer to the original section numbering of the NLRA but with parallel citation to the United States Code.

Labor Relations Bd. (1979) 24 Cal.3d 335, 345; see generally, Levy, *The Agricultural Labor Relations Act of 1975 — La Esperanza de California Para El Futuro* (1975) 15 Santa Clara L. Rev., 783 [hereinafter cited as Levy].) That intent is clear from the Act itself, section 1148 of which directs that "[t]he board shall follow applicable precedents of the [NLRA], as amended." State courts similarly will "look to established administrative and judicial interpretations of the federal act as persuasive indicants of the appropriate interpretation of the state legislation. [Citations.]" (*Highland Ranch* v. *Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848, 855-856.)

Both the state and federal acts permit union security agreements which require membership in a labor organization as a condition of continued employment.

The ALRA borrows word for word from the NLRA in, first, declaring expansive rights of employees to freely organize and participate in concerted activity directed at collective bargaining and, then, declaring a converse right to disassociate from such activities — but subject to the effect of union security agreements authorized by the act.

Section 1152 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities *except*

to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153." (Emphasis added.) Thus the section announces two complementary rights, one to associate and one to disassociate with concerted activities aimed at collective bargaining. It is apparent from the italicized language — its use of the word "right" in the singular and its position immediately following the announced right to *refrain* from concerted activities — that an authorized agreement conditioning continued employment on union membership is expected to adversely affect the *dis*associational right.

Again following the federal model, the ALRA states in section 1153: "It shall be an unfair labor practice for an agricultural employer to do any of the following: [¶] (a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152. . . . [¶] (c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." Subdivision (c) of section 1153 continues, in part: "Nothing in this part,[9] or any other statute of this state, shall preclude an agricultural employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this section as an unfair labor practice) to require as a condition of employment, membership therein on or after the fifth day following the beginning of such employment, or the effective date of such agreement whichever is later, . . ."

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[9] The Act comprises part 3.5 of Division 2 of the Labor Code.

Therefore, in defining what actions of an agricultural employer will constitute unfair labor practices, section 1153 carves out an exception for certain actions taken pursuant to an authorized union security agreement. Section 1154, defining what actions of a *labor organization* constitute unfair labor practices, similarly leaves room for the effects of such an agreement.[10]

With minor drafting differences, the federal act operates in much the same way. It declares the identical associational rights plus the disassociational right made subject to authorized union security agreements. (29 U.S.C. § 157 [formerly NLRA § 7].) It also defines unfair labor practices for both employers and labor organizations so as to accommodate the effects of such agreements. (29 U.S.C. § 158 (a)(1), (a)(3) [formerly NLRA § 8(1), (3)], (b)(1) and (b)(2).)

Central to the controversy here is our state Act's divergence from the federal model in setting forth what

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[10] Section 1154 states, in relevant part:

"It shall be an unfair labor practice for a labor organization or its agents to do any of the following:

"(a) To restrain or coerce:

"(1) Agricultural employees in the exercise of the rights guaranteed in Section 1152. This paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

". . . . . .

"(b) To cause or attempt to cause an agricultural employer to discriminate against an employee in violation of subdivision (c) of Section 1153, or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated for reasons other than failure to satisfy the membership requirements specified in subdivision (c) of Section 1153."

Petitioners Pasillas and Navarro both brought unfair labor charges against the Union (§ 1154, subds. (a)(1) and (b)), while only Pasillas brought charges against his employer (§ 1153, subds. (a) and (c)).

conduct of an employee may result in his or her forced discharge from employment under a valid union security agreement.

Ever since the Taft-Hartley Act amendments in 1947, forced discharge under the NLRA has been explicitly restricted to instances wherein an employee's union membership is denied or terminated for nonpayment of periodic dues or initiation fees. The beginning language of section 158(a)(3) (29 U.S.C.)reads essentially the same today as its predecessor section in the Wagner Act of 1935. The section presently provides, in part, that it shall be an unfair labor practice for an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment[,] to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statu[illegible] of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . ." (Compare 29 U.S.C. § 158(a)(3), with Act of July 5, 1935, ch. 372, § 8(3), 49 Stat. 452.) Thus, as originally enacted, the NLRA placed no express limits on use of the union security agreement.

The Wagner Act's provisions were reenacted in 1947 as part of the Taft-Hartley Act (see fn. 8, *ante*), and the union security section was thereby amended in an effort by Congress to cure serious abuses of union security arrangements — particularly the closed shop. (*Labor Board* v. *General Motors* (1963) 373 U.S. 734, 738-741.) The amendments abolished the closed shop by extending the section's original proviso so that an employee could

satisfy the union membership condition imposed by a union security agreement by becoming a member of the union "on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, . . ." (29 U.S.C. § 158(a)(3).) More important to our discussion, however, was the addition of a further proviso, "That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that *membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required* as a condition of acquiring or retaining membership."[11] (*Ibid.*; emphasis added.)

The practical effect of the Taft-Hartley amendments was to make "significant alterations in the meaning of 'membership' for the purposes of union-security contracts . . . . It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a

[11] Reflecting that newly imposed restriction, the Taft-Hartley Act also made it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of [§ 158(a)(c)] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ." (29 U.S.C. § 158(b)(2).)

condition of employment is whittled down to its financial core. . . ." (*Labor Board* v. *General Motors, supra*, 373 U.S. 734, 742.) Thus the amendments "were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. . . . Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. . . ." (*Radio Officers* v. *Labor Board* (1954) 347 U.S. 17, 40-41; *Labor Board* v. *General Motors, supra*, 373 U.S. at pp. 740-741.)

In contrast, our Legislature departed from the federal act's example, preferring the following limitation on "membership" for purposes of union security agreements: "For purposes of this chapter, membership shall mean the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing; provided, that such membership shall not be denied or terminated except in compliance with a constitution or bylaws which afford full and fair rights to speech, assembly, and equal voting and membership privileges for all members, and which contain adequate procedures to assure due process to members and applicants for membership." (§ 1153, subd. (c).)

* * *

III

Pasillas and Navarro contend that section 1153, subdivision (c), of the Act, both by its enactment and in its application in the instant cases, impermissibly abridges

their fundamental rights to free speech and association guaranteed them by the First and Fourteenth Amendments of the federal Constitution and by article I, sections 2 and 3, of the California Constitution. Section 1153, they argue, in authorizing union security agreements which require a worker to join and maintain membership in good standing in a union, is unconstitutional because it does not serve a compelling state interest by the least intrusive means available. Further, Pasillas maintains that the section's uniquely expansive authorization of the union security device in California agriculture, where workers are predominantly Mexican-American or of hispanic origin, violates the Equal Protection Clause of the Fourteenth Amendment. The common starting point for these claims is the question of "state action." (*Lugar* v. *Edmondson Oil Co.* (1982) 457 U.S. 922, 936-937; see *Rendell-Baker* v. *Kohn* (1982) 457 U.S. 830, 837.)[18]

Does the enactment or application of section 1153, subdivision (c), constitute state action? No reported decision has yet passed on the question. However, we are guided by federal decisions which have examined the issue of state action in the context of union security agreements authorized under the NLRA and the Railway Labor Act (RLA) (45 U.S.C. § 151 et seq.).

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[18] For the sake of clarity and simplicity, we employ the term "state action" throughout this opinion to connote actions of either the state or federal governments.

We decline to address the issue raised by Pasillas that the ALRA's assertedly disparate impact on Mexican-American or hispanic workers also violates rights guaranteed under section 1981 of the United States Code, title 42. The issue is spuriously appended to his equal protection argument without any citation to authority.

In *Railway Employes' Dept.* v. *Hanson* (1956) 351 U.S. 225, the United States Supreme Court found state action in the operation of the RLA's provision authorizing union security agreements (45 U.S.C. § 152 Eleventh) and thereby reached state and federal constitutional questions in the case. The court observed that, while the RLA section did not compel but merely permitted union shop agreements, it specifically preempted state law, thereby conflicting with a state law in that case that would have invalidated the agreement. "If private rights are being invaded," the court reasoned, "it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. [Citation.] In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. [Citations.] The *enactment of the federal statute authorizing union shop agreements is the governmental action* on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." (351 U.S. at p. 232; fn. omitted and emphasis added.)

In two subsequent cases, both involving employee challenges to the use of union dues collected from them under the same RLA provision at issue in *Hanson*, the Supreme Court grounded its decisions on a construction of the statute that forbids use of dues for political purposes which an employee opposes. (*Machinists* v. *Street* (1961) 367 U.S. 740, 768-769; *Railway Clerks* v. *Allen* (1963) 373 U.S. 113, 118.) Constitutional issues, and hence the question of state action, therefore did not arise.

Then, in *Abood* v. *Detroit Board of Education* (1977)

431 U.S. 209, the Supreme Court was faced with challenges to the exaction and use of service charges (equivalent in amount to member dues) paid by non-member employees pursuant to an agency shop arrangement authorized by a state statute allowing union representation of local government employees. (431 U.S. at pp. 212-215.) Relying on *Hanson* and *Street*, and drawing parallels between the operation and purposes of the state act and the RLA, the court upheld the validity of the agency shop arrangement itself and concluded that the union expenditures were valid for purposes related to the union's collective bargaining role but not for unrelated political purposes to which the employee objected. (*Id.*, at pp. 226-227, 233-237.)

On the issue of state action, the *Abood* court noted that the affected employees worked directly for the state and that "the actions of public employers surely constitute 'state action,' . . ." In a footnote, the majority added this clarification of its position, quoting from and responding to remarks made by Justice Powell in his concurring opinion: "Nothing in our opinion embraces the 'premise that public employers are under no greater constitutional constraints than their counterparts in the private sector,' . . . or indicates that private collective-bargaining agreements are, without more, subject to constitutional constraints . . . . We compare the agency-shop agreement in this case to those executed under the Railway Labor Act simply because the existence of governmental action in both contexts requires analysis of the free expression question." (*Id.*, at p. 226, fn. 23; see concurring opn. of Powell, J., *id.*, at pp. 245, 252.) By that footnote, the majority made it clear that state action

in *Abood* was furnished by the actions of a public employer and not by reliance on any rationale of the RLA cases. The majority had emphasized in an earlier footnote that state action in the *Hanson* decision, *supra*, had depended on the RLA's preemption of contrary state law; it had further noted in passing that the NLRA, unlike the RLA, does not preempt state right-to-work laws but in fact expressly authorizes them. (P. 218, fn. 12; 29 U.S.C. § 164(b).)

Recently, the high court once more considered challenges to the use of dues compelled under an RLA-authorized union security agreement, and, as in *Hanson*, had occasion to reach constitutional claims. In *Ellis* v. *Brotherhood of Railway, Airline and Steamship Clerks* (April 25, 1984) _____ U.S. _____,* employees of a private airline argued that use of fees to finance various union expenditures was improper and that a union rebate program devised to protect the rights of protesting employees was deficient. The court agreed on the latter score (_____ U.S. at p. _____)** and then examined each of the fee-funded union activities at issue, applying the statutory construction standard previously utilized in the post-*Hanson* cases of *Street* and *Allen* (both discussed *supra*). Finding that funding of three of the six activities was indeed authorized by the RLA, the court subjected those expenditures to First Amendment scrutiny and upheld them. (*Id.*, at pp. _____ - _____.)***

Ellis appears to pose conceptual difficulties as regards state action. The objecting employees there worked for a

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* Advance Report Citation: 52 U.S.L. Week 4499.

** 52 U.S.L. Week 4499, 4501.

*** 52 U.S.L. Week 4499, 4504-4505.

private rather than a state entity, and although the dispute arose under an RLA-authorized agreement which would have preempted any contrary state law, the case originated in California which, we are authorized to notice (Evid. Code, § 451, subd. (a)), has not enacted right-to-work legislation. Despite this theoretical problem (see discussion in *Wicks* v. *Southern Pacific Co.* (9th Cir. 1956) 231 F.2d 130, 135-137, cert. den., 351 U.S. 946), the practical answer appears to be that the state action issue was simply never raised or preserved for review. The Supreme Court opinion does not address it, and the decision below by the Ninth Circuit Court of Appeals seems to assume in a footnote, without analysis, that the *Hanson* decision is controlling on the point. (*Ellis* v. *Broth. of Ry., Airline & S. S. Clerks* (9th Cir. 1982) 685 F.2d 1065, 1067, fn. 1.)

While the United States Supreme Court has not directly spoken on the state action question in the context of NLRA section 8(a)(3), the parallel provision to our Act's section 1153, subdivision (c), several federal circuit courts have specifically addressed the question and differed in their conclusions. In the most recent and by far most thorough analysis, the District of Columbia Circuit in *Kolinske* v. *Lubbers* (D.C. Cir. 1983) 712 F.2d 471, argued persuasively and concluded that an agency shop clause conditioning access to strike benefits on, among other things, participation in strike activities, did not constitute state action. Noting that "section 8(a)(3) of the NLRA at most merely authorizes the use of agency shop fees" and the "crucial distinction" that the NLRA, unlike the RLA, does not preempt state right-to-work laws, the court found no direct governmental involvement and thus distinguished the *Hanson* ratio-

nale. (712 F.2d at p. 476.) The *Kolinske* court next went on to distinguish the public employer rationale of *Abood*, since the actor in *Kolinske* was a private entity — a union. (Pp. 474, 476-477.) Finally, facing what it concluded was an open question requiring independent inquiry, the court exhaustively studied the various strands of state action doctrine, ultimately concluding that the indirect action of the government in authorizing union security provisions through the enactment of the NLRA did not sufficiently involve the government so as to trigger First Amendment scrutiny. (Pp. 477-480.)

In a much earlier case, the 10th Circuit had reached the same result, even without the benefit of the Supreme Court's later decision in *Abood*. In *Reid* v. *McDonnell Douglas Corporation* (10th Cir. 1971) 443 F.2d 408, no state action was found in the compulsory exaction of agency fees from non-members pursuant to an NLRA-based union security clause, and the constitutional claims of the plaintiff class, who objected to use of the fees for union political purposes, could not be reached. The RLA rationale was perceived as hinging on the preemption of state law and possibly on the comprehensive regulatory scheme evident in the RLA. As to the latter point, the court stated, "Whatever the wisdom of this reasoning for the [RLA], it has no applicability to the [NLRA]," concluding that "the policy with respect to union security agreements expressed in the NLRA is more neutral and permissive than the policy of the RLA." (443 F.2d at p. 410; see also *Peltzman* v. *Central Gulf Lines, Inc.* (2d Cir. 1974) 497 F.2d 332, 334 [summarily rejecting constitutional attacks on a union security clause under the NLRA], cert. den. (1976) 423 U.S. 1074.)

Standing against the *Kolinske* and *Reid* cases is the First Circuit decision in *Linscott* v. *Millers Falls Company* (1st Cir. 1971) 440 F.2d 14 (cert. den., 404 U.S. 872), where a two-member majority of the court found state action in an NLRA-authorized union shop agreement entered into between a private employer and the union. The court was therefore able to reach the plaintiff's First Amendment claim that coerced payment of dues violated her right to free exercise of religion, a claim which the court ultimately rejected on the merits. (440 F.2d at pp. 17-18.) Dismissing the argument that *Hanson*, an RLA case, should be distinguished because of the preemption feature of that act, the majority reasoned that, by necessary implication from the RLA's preemption provision, "federal approval, and hence federal enforcement, will exist in those states that do not enact such a law. [Citations.]" (P. 17.) The concurring member in *Linscott*, who would have affirmed solely on the basis that there was no state action, argued forcefully that the NLRA provision (29 U.S.C. § 164(b)) allowing state right-to-work laws "is not only incapable by its terms of overriding any inconsistent state legislation but, unlike the [RLA] provision, represents a weakening rather than a strengthening of federal policy toward union shop . . . . [I]t would follow logically from a ruling that [the NLRA provision] constitutes federal support and authority for union shop that [its preenactment] Congressional silence also constituted federal support and authority. From that logical point it is but a short step to the conclusion that all Congressional silence constitutes endorsement or, put another way, that all federal inaction is really federal action." (*Id.*, concurring opn. of Coffin, J., at pp. 19-20.)

Two other circuit court opinions of approximately the same vintage as *Linscott* implicitly assume without discussion that state action exists in the NLRA context. (*Hammond* v. *United Papermakers & Paperworkers Union* (6th Cir. 1972) 462 F.2d 174, 175 [citing *Linscott*], cert. den., 409 U.S. 1028; *Seay* v. *McDonnell Douglas Corporation* (9th Cir. 1970) 427 F.2d 996, 1003 [citing *Hanson*].) However, the issue appears not to have been disputed in either case.

We are satisfied, upon this survey of federal precedent, that the reasoning of the *Kolinske* and *Reid* decisions is sound and should be applied in analyzing our own Act. The *Linscott* majority opinion stands alone, in its finding of state action, among all circuit courts to have expressly considered the question in the NLRA context. To the extent that the *Linscott* majority relied on *Hanson* for its finding of state action, we are confident that a different conclusion would have been reached had that court had the benefit of the 1977 Supreme Court decision in *Abood*, which removed any doubt that the state action in *Hanson* depended on the preemptive feature of the RLA, a feature not found in the NRLA.[19] To the extent

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[19] In a recent case, involving an employee's federal constitutional challenge to his denial of formal union membership for his refusal to swear an oath, the First Circuit reexamined its *Linscott* decision. In *Hovan* v. *United Broth. of Carpenters & Joiners* (1st Cir. 1983) 704 F.2d 641, the court found no state action, distinguishing *Linscott* as involving a discharge under a union security agreement whereas the employee in *Hovan* merely sought to be allowed to attend union meetings and could not, under the NLRA, have suffered discharge for refusing to take the oath. (*Hovan*, *supra*, 704 F.2d at pp. 643-644.) On the basis of that distinction, apparently one of degree rather than principle, the court found no need to "call *Linscott* into question to conclude that no governmental action [was] present" in *Hovan*. (*Id.*, at p. 643.) However, after reconsidering its *Linscott* rationale in retrospect and in light of the *Abood* clarification (that *Hanson* depended on preemption for state action), the court observed, "[I]n *Linscott*, this court went beyond *Hanson* . . . ." (*Ibid.*)

that the *Linscott* majority relied on the NLRA's anti-preemption provision as an indicant of state action,[20] we are persuaded by the concurring opinion's argument that such inaction could not constitute action.

Bringing the principles of the federal decisions to bear on our state Act, we initially conclude that nothing in its provisions compels the use of union security agreements. Our Act, like the NLRA, is neutral in this respect and leaves the parties free to accept or reject such agreements. The Act carefully leaves that component of free choice intact in defining associational rights of employees (§ 1152), unlawful restraint or coercion of an employee's exercise of those rights (§§ 1152, 1153, subd. (a), 1154, subd. (a)(1)) and unlawful discrimination on the basis of union membership (§§ 1153, subd. (c), 1154, subd. (b)).

But does our Act, like the RLA, preempt a preexisting bar to the inclusion or enforcement of such agreements by authorizing them? We conclude not. No preexisting statute established such a bar, and the common law labor policy of California embraced a wide variety of union security agreements, including those calling for the closed or union shop. (*Messner* v. *Journeymen Barbers etc. International Union* (1960) 53 Cal.2d 873, 877-879, 882-883; *Petri Cleaners, Inc.* v. *Automotive Employees, etc., Local No. 88* (1960) 53 Cal.2d 455, 470-471.) Suspension or expulsion under such agreements was permissible, subject to rudimentary due process requirements of notice and hearing in the case of discipline for

[20] The NLRA provision (29 U.S.C. § 164(b) reads: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."

charges other than nonpayment of dues and fees. (*DeMille* v. *American Fed. of Radio Artists*, *supra*, 31 Cal.2d 139, 154-155.) It was observed in *Gabaldon* v. *United Farm Workers Organizing Committee* (1973) 35 Cal.App.3d 757 (cert. den. (1974) 416 U.S. 957), just two years before enactment of the ALRA, that "California has no statute or policy either requiring that collective bargaining agreements include union shop provisions or invalidating such agreements. . . ." (35 Cal.App.3d at p. 763.)

There being no element of compulsion in the Act favoring the use of union security agreements, the question becomes whether the Act's mere authorization and protection of them constitutes state action.

Helpful in this part of the analysis is *Gabaldon* v. *United Farm Workers Organizing Committee*, *supra*, for that case considered the question of whether, in a pre-ALRA setting, the actions of a union and an employer in entering into a union security agreement under which a worker charged with "antiunion activity" could be discharged at union request, constituted state action by virtue of California's (pre-ALRA) policy to encourage and protect union shop agreements. (35 Cal.App.3d 757, 760-761, 764.) Farm worker class action plaintiffs in *Gabaldon* sought damages and declaratory and injunctive relief in a suit against the union and 26 growers, alleging deprivation of numerous constitutional rights. (*Id.*, at pp. 759-762.) The appellate court found no state action, however, and therefore affirmed a judgment on the pleadings in the defendants' favor. (P. 768; in accord is the companion case in federal court, *Mendoza* v. *United Farm Workers Organization Committee* (9th Cir. 1973) 487 F.2d 311, 312, cert. den. (1974) 415 U.S. 918.)

Plaintiff-appellants in *Gabaldon* argued that there was state action in California decisions upholding the validity of union security agreements, in decisions holding local right-to-work ordinances invalid as preempted by state statutes, and Labor Code provisions which outlawed yellow-dog contracts, provided for enforcement of collective bargaining agreements, declared associational and self-organizational rights for workers and made coercion of employees regarding union membership illegal. The Court of Appeal responded: "In our view . . . the state policy so announced and the case decisions referred to do not change the fundamental fact that California has taken no action to require the inclusion of a union shop provision in a collective bargaining agreement or to invalidate such a provision. A collective bargaining agreement without a union shop covenant is entitled to legal protection. The position of the state can best be characterized as one of benign neutrality in that labor and management are free from any hindrances upon opportunities to bargain collectively. The Legislature has in effect left the field unregulated, neither requiring nor prohibiting union shop provisions but lending its support and encouragement to collective bargaining agreements freely entered into and making them equally enforceable in the courts whether such agreements do or do not contain union shop provisions. Such passivity falls far short of the state action required to bring the federal constitutional protections into operation." (35 Cal.App.3d 757, 764-765.)

On the issue of whether preemptive state statutes invalidating local right-to-work ordinances created a *Hanson*-type state involvement, the *Gabaldon* court distinguished *Hanson*, in part, by this reasoning: "[T]he union shop has always been lawful in California and thus the enactment of the [complained of] Labor Code sections did not

divert from the traditional policy of the state. [Citation.] Furthermore, the local right to work ordinances did not originate until well after the enactment of the controlling sections of the Labor Code, while in *Hanson* the right to work laws were enacted prior to the union shop provision of the [RLA] which was designed to supersede them . . . ." (P. 767.)

Pasillas and Navarro do not argue against the reasoning in *Gabaldon*; rather, they argue that subsequent enactment of the ALRA inaugurated a deeper involvement of the state into privately negotiated union security agreements which now sufficiently imbues those private actions with the imprimatur of the state to trigger constitutional scrutiny. We have to disagree.

California's previous position of "benign neutrality" regarding the freedom of labor and management to include or exclude union security agreements remains unchanged with the advent of the ALRA. Measuring the ALRA against the NLRA, Pasillas and Navarro would find an *increased* state involvement in our Act's rejection of the NLRA dues-and-fees limitation on discharges and its broad tolerance of discharges for suspensions and expulsions grounded on other disciplinary charges. (§ 1153, subd. (c).) However, in this regard the ALRA is no different from federal law under the original Wagner Act, which lacked the dues-and-fees limitation. The ALRA, by *not* imposing that limitation, thus constitutes *less* of a governmental intrusion than its present day federal counterpart. Also, it must be remembered that Pasillas and Navarro, who belong to a class of workers (agricultural employees) not covered by the NLRA and its dues-and-fees limitation, would enjoy no

greater protection against use of union security agreements if the ALRA were repealed or invalidated. In fact they would *lose* protections granted them under the Act which were traditionally unknown in the area of internal union discipline. (See discussion in part IV, *post*.) But more importantly, the state and federal differences in the permitted scope of union security operation once agreements are reached does not alter either act's passive neutrality regarding the freedom to include or exclude those agreements in the first place.

The Act similarly does not change prior law in its neutral enforcement of collective bargaining agreements. As before, enforcement is available whether or not they contain union security provisions. (§ 1165.)

The pre-ALRA reasoning of *Gabaldon* is, in our view, still valid. It was noted there that the Legislature had "in effect left the field unregulated, *neither requiring nor prohibiting* union shop provisions but *lending its support and encouragement* to collective bargaining agreements *freely entered* into and making them *equally enforceable*" regardless of the inclusion of union security provisions. (35 Cal.App.3d 757, 765; emphasis added.) In enacting the ALRA, however, the Legislature has essentially codified the state's previous policy as to union security agreements. As already noted, such agreements are still neither required nor prohibited, and collective bargaining agreements continue to be equally enforced, with or without them. The characteristics of support and encouragement and freedom of choice also remain evident not only in the operation of the Act, but also in the statement of policy found in section 1140.2. The state's policy under the Act is to "encourage and protect" the right of agricultural employees to, among other things,

full freedom in "designation of representatives" and freedom to "negotiate the terms and conditions of their employment, . . ." (§ 1140.2.)

We hold that neither the inclusion of union security agreements authorized by the Act nor their enforcement against Pasillas and Navarro constituted state action; constitutional protections therefore did not attach.

We reach the same result notwithstanding reliance by Pasillas and Navarro on the rationale of *Gay Law Students Assn.* v. *Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, to support their argument that state action can be found under the California Constitution. Drawing in part upon an overview of federal labor cases including *Steele* v. *L. & N. R. Co.* (1944) 323 U.S. 192, *Hanson* and *Abood*, the Supreme Court in *Gay Law Students* concluded that a public utility, by virtue of its state-protected monopoly status and quasi-government entity character, was prevented by our state's equal protection guarantee (Cal. Const., art. I, § 7, subd. (a)) from arbitrarily excluding homosexuals from employment opportunities. (*Gay Law Students*, *supra*, 24 Cal.3d at pp. 469-475.) Then, relying in part on a rule first articulated in this state in *James* v. *Marinship Corp.* (1944) 25 Cal.2d 721, that a labor union having attained a monopoly supply of labor owes similar but common-law-based obligations to refrain from arbitrary discrimination in choosing its members, the court found that the public utility's discriminatory employment practices also violated a statutory embodiment of those common law duties. (Pub. Util. Code, § 453, subd. (a); *Gay Law Students*, *supra*, at pp. 480-485.)[21]

[21] Justice Tobriner, writing for the court in *Gay Law Students*, rea-

The Board, which now takes the position that there is *no* state action, has itself relied on the *Gay Law Students* rationale to *find* state action in the operation of an Act-authorized union security agreement like the ones at issue here. (*J. Jesus R. Conchola* (1980) 6 A.L.R.B. No. 16, pp. 10-15.) It was made clear at oral argument, however, that the Board considers its decision in *Conchola* to have been "advisory" only.

We do not believe that *Gay Law Students* can be read for the broad proposition being urged here — that state action is present whenever a union enjoying "monopoly" status acts pursuant to a state-authorized union security agreement; the decision must be read in context, as addressing only the problem of *arbitrary discrimination* in employment (or membership) criteria affecting an individual's fundamental right to work. The "state action" found in that case was enough to trigger our state Constitution's equal protection guarantee, but the Supreme Court gave no indication in that case that the

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soned: "In *Marinship* [a case challenging discrimination against blacks in union membership] our court emphatically rejected the suggestion that a union with a closed shop agreement could be equated with an ordinary private voluntary association. Chief Justice Gibson declared: 'Where a union has, as in this case, attained a monopoly of the supply of labor . . . such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living.' (25 Cal.2d [721] 731.) [¶] As Chief Justice Gibson explained, a union's legal obligations under such circumstances flowed from the long-established common law doctrine [. . .] which prohibited the holder of monopoly power from using its power in an arbitrarily discriminatory fashion. . . ." (*Gay Law Students*, *supra*, 24 Cal.3d 458, 481-482, bracketed additions and deletions ours.)

same threshold degree of governmental involvement would have sufficed as well for our state's free speech and associational guarantees.

The principal federal case relied upon in *Gay Law Students* similarly concerned arbitrary (i.e., racial) discrimination and was resolved by construing the RLA as demanding rights *coextensive* with federal equal protection, not by making the federal constitutional protection directly applicable. *(Steele v. L. & N. R. Co., supra*, 323 U.S. 192, 202 [the RLA imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates].)

The *Marinship* strand of the *Gay Law Students* decision also imposed no further obligation on the public utility than to refrain from arbitrary discrimination. That common law duty arising out of "monopoly" concepts, moreover, cannot aid Pasillas or Navarro because they do not assert that the UFW's actions under the union security agreements here in question were arbitrary.

IV

We next consider whether the Board abused its discretion in concluding that the UFW's rule requiring a member to respect its strikes and picket lines (see fn. 4, *ante*) was a "reasonable" term or condition within the meaning of section 1153, subdivision (c), and hence a permissible basis for Navarro's discharge.[22] For reasons

[22] We consider this important issue even though it is merely one alternative basis upon which Navarro's petition could have been resolved. (See part VI of this opinion, *post*.)

which follow, we believe that the Board misconceived its role under the Act and therefore conducted an incomplete review of "reasonableness."

As discussed in part I of this opinion, the ALRA and NLRA approach the matter of union security in essentially the same manner, first guaranteeing broad rights to engage in or refrain from concerted organizational activity and then allowing authorized union security agreements to interfere with the "right to refrain." Next, both acts provide a grace period for satisfying membership requirements — 30 days for the NLRA and 5 days for the ALRA.[23] (29 U.S.C. §§ 157, 158(a)(3); ALRA §§ 1152, 1153, subd. (c).)

The crucial point of departure is in each act's treatment of the concept of "membership" as such term is relevant to potential loss of employment. Section 158(a)(3) of the federal act states in its second proviso that no employer is justified in discriminating against an employee for nonmembership in a union if he has reasonable grounds for believing either that (1) "such membership was not available to the employee on the same terms and conditions generally applicable to other members" or that (2) "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ." Section 1153, subdivision (c), of our state Act shares the NLRA's concern for uniform application of internal union rules, defining "membership" as the satisfaction of only "terms and conditions [which are]

[23] The shorter time period for the state Act was necessitated by the "transient, often short-term nature of agricultural employment . . . ." (Levy, *supra*, at p. 790.)

uniformly applicable to other members . . . ."

However, there are fundamental differences between the NLRA and the ALRA treatment of union security. First, rather than limit discharges to dues-and-fees grounds, the ALRA sanctions discharge where loss of good standing is based on failure to satisfy "reasonable terms and conditions" of membership. Thus, violation of any uniformly applicable term or condition may result in loss of employment if that term or condition is "reasonable." The federal language does not contain a reasonableness requirement. Second, the following compound proviso is added to the ALRA. "[S]uch membership shall not be denied or terminated except in compliance with a constitution or bylaws which afford full and fair rights to speech, assembly, and equal voting and membership privileges for all members, and which contain adequate procedures to assure due process to members and applicants for membership." (§ 1153, subd. (c).)

The scheme of section 1153 may be summarized in this way. By going beyond the present federal dues-and-fees limitation, the ALRA creates a situation analogous to the closed shop under the pre-1947 Wagner Act. The union "uses its own membership standards as a basis on which to exclude [or terminate] men from employment." (*Wallace Corporation* v. *Labor Board* (1944) 323 U.S. 248, 268, dissenting opn. of Jackson, J.) However, unlike the Wagner Act, which denied the NLRB "any power to supervise union membership or to deal with union practices, however unfair they may be to members [or] applicants, . . ." (*ibid.*), section 1153 bridles union membership standards with the requirement of reasonableness and grants the Board intrusive powers of review over internal disciplinary matters whenever the discipline

results in loss of good standing and the concomitant threat of discharge under a union security agreement.[24]

The Board in the case before us examined the disciplinary proceedings for compliance with a union "constitution" affording "full and fair rights" and "adequate procedures to afford due process" to the workers, as the statute directs. That is, it reviewed the fairness of the proceedings by internal union standards.[25] What is disputed is the Board's finding of reasonableness.

The Board stated, "In this case, the question is whether the UFW's requirement regarding the honoring of picket lines and strikes is *reasonably related to a legitimate union interest that is germane to its role as collective bargaining representative.* We are convinced that the ability to enforce disciplinary rules during a strike is necessary for a union to be able to carry out its duties as

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[24] This supervisory power of the Board exists only where the ultimate sanctions of suspension or expulsion are imposed. Any disciplinary action short of that will not support loss of employment and hence Board review under section 1153, subdivision (c). Neither worker-petitioner in these cases disputes a union's right to impose those lesser disciplinary sanctions for strikebreaking. (*NLRB* v. *Allis-Chalmers Mfg. Co., supra*, 388 U.S. 175, 182-186.)

[25] Navarro took the position at oral argument that the "full and fair rights to speech, assembly, and equal voting and membership privileges" mentioned in the statute (§ 1153, subd. (c)) refer only to internal procedural fairness and not to limits on the reasonableness of a disciplinary charge itself. That position accords with the view of one commentator who was close to the act in its formation: "This provision appears to have been designed to encourage internal union democracy and to require that a labor organization negotiating union security agreements adhere to certain basic democratic principles." (Levy, *supra*, at p. 791; see mention of Mr. Levy's role in *Highland Ranch* v. *Agricultural Labor Relations Bd., supra*, 29 Cal.3d 848, 860.)

the . . . employees' representative."[26] (Emphasis added; fns. omitted.) The standard employed (italicized above) was drawn from expressions in *Steelworkers* v. *Sadlowski* (1982) 457 U.S. 102, 121, and *Pinsker* v. *Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 558. Navarro contends, and we agree, that the Board's use of that standard, without further inquiry, was an abuse of discretion.

At issue in *Steelworkers* v. *Sadlowski* was the meaning of the term "reasonable" as used in section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), commonly known as the Landrum-Griffin Act (29 U.S.C. § 401 et seq.). That section, part of the LMRDA's "Bill of Rights" for union members, grants enumerated freedoms of speech and assembly in internal union matters but, in a proviso, leaves unimpaired a union's right to adopt and enforce "reasonable rules" as to a member's responsibilities toward the union.[27] Noting that a union rule in *Sadlowski* prohibiting

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[26] This reasoning and conclusion, while stated in the initial decision in the consolidated cases of Pasillas, Martinez and Scarbrough, were evidently relied on in Navarro's case, issued the same day. Board member McCarthy, in his dissent, disagreed with both the standard of reasonableness employed by the majority and the conclusion reached. (See fn. 7, *ante*.)

[27] LMRDA section 101(a)(2) (29 U.S.C. § 411(a)(2)) provides: "Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

candidates for union office from accepting campaign contributions from nonmembers might interfere with rights which Congress intended to protect by the LMRDA, the United States Supreme Court nevertheless held the rule valid as "rationally related to a legitimate and protected [union] purpose, and thus . . . sheltered by the proviso to § 101(a)(2)." (457 U.S. 102, 121.)

Pinsker v. *Pacific Coast Society of Orthodontists*, a California Supreme Court decision, involved the common law fair procedure right of an individual to be free of "arbitrary" rules of a private organization to which he or she belongs or aspires to belong. The standard announced in *Pinsker* was that enforcement of a rule would not be prohibited unless it was either "contrary to established policy" or "so 'patently arbitrary and unreasonable' as to be 'beyond the pale of the law.'" (12 Cal.3d 541, 558.) Under that standard, a rule not allowing an orthodontist to delegate his services or operations to one less qualified than himself where orthodontic competence was required was held reasonable. (*Id.*, at pp. 558-559.)

The Board, in finding the UFW requirement regarding the honoring of picket lines and strikes "reasonably related to a legitimate union interest," fulfilled only a portion of its obligation to determine reasonableness.[28] We hold that the Board must not only determine (1) whether the rule is reasonable in its relation to legitimate union goals and functions, but also (2) whether the

[28] We agree that the UFW's rule against strikebreaking and crossing picket lines is valid by the *Sadlowski*/*Pinsker* standard devised and applied by the Board, and we assume from lack of argument to the contrary that all parties herein agree that such an intrinsic standard of reasonableness must, as a threshold matter, be met.

application of the rule to impose the sanction of suspension or expulsion is reasonable in the particular case at hand after balancing union interests and the interests of the worker.

It is important to remember the severe consequences of a union rule violation under the ALRA. Unlike the federal act, the ALRA equates all loss of good standing with the threat of firing. Thus, violation of an internal union rule may result not only in loss or suspension of membership, the ultimate internal sanctions, but also in loss of employment, a potentially crippling external sanction. Depending upon the strength and success of the certified representative union at the time and the prevalence of union security provisions in its collective bargaining agreements, loss of employment and good standing could mean loss of a worker's fundamental right to work for a living. (Cf. *James* v. *Marinship Corp., supra*, 25 Cal.2d 721, 731.)

Thus the context in which the word "reasonable" appears is particularly important, for it is found in a special definition of "membership" applicable only where loss of employment under a union security provision is at stake. The Board has authority under subdivision (c) to scrutinize union disciplinary proceedings *only* where loss of good standing has occurred. The Board's analogy to the situation under the LMRDA, as explored in the *Sadlowski* decision, for example, where review of disciplinary proceedings is available for lesser sanctions, is not persuasive. Loss of employment was not and could not have been at issue in *Sadlowski* because under the federal scheme firing could only occur for nonpayment of dues and fees, not for other rules violations. For that reason, too, the court in *Sadlowski* was able to announce

a fixed holding of reasonableness applicable to all future cases in which the campaign contribution rule was at issue, without regard to possible factual variations. The hardship endured by candidates for union office, that is, denial of outside campaign contributions, would remain fairly constant from case to case and would never jeopardize rights enjoyed beyond the internal workings of the union itself. Neither the severe consequence of firing nor the variable hardships which the firing might entail were factors relevant to the definition of "reasonable."

Further, the context of the instant cases also makes resort to the *Pinsker* standard of arbitrariness insufficient alone. There would have been no need to insert the word "reasonable" in the statute if it was thought that common law notions of fair procedure would apply in any event. The word "reasonable" would therefore seem to go beyond the common law protections addressed in *Pinsker*.

The pre-enactment history of the ALRA also supports an expanded review for reasonableness. As originally drafted, the Act would have mirrored the dues-and-fees limitation of the NLRA. Its present union security language is the product of a compromise agreement between representatives of the UFW and various growers reached in early May of 1975, about one month before the legislation was signed into law. (Assembly Committee Hearing, *supra*, at pp. 4, 17, 37, 45; Author's Amend. to Sen. Bill No. 813 (1975-1976 Reg. Sess.) May 6, 1975; Author's Amend. to Assem. Bill No. 1533 (1975-1976 Reg. Sess.) May 5, 1975.) As part of those changes, the dues-and-fees limitation was dropped in favor of the open-ended "reasonable terms and conditions" language,

and internal union disciplinary proceedings resulting in loss of good standing were made reviewable by the Board. In a public hearing before the Senate Industrial Relations Committee, then Secretary of Agriculture and Services (now Chief Justice) Rose Bird explained the trade-off evident in subdivision (c): "[T]hat was part of the compromise, that if the labor organization wanted to have the economic power . . . they also had to give to the board the power to look into their internal organization and their internal workings *to insure that those were fair and comported with due process.*" (Emphasis added.) (Hearing before Sen. Ind. Rel. Com. on Sen. Bill No. 1 (Third Ex. Sess., May 21, 1975 [hereinafter "Senate Committee Hearing"] p. 73.)

In response to strong criticism at the Senate committee hearing that the amended language left too little protection for workers disciplined on grounds other than nonpayment of dues and fees, Secretary Bird repeatedly emphasized that the Board's review powers would be exercised to insure fairness and due process, saying, "[T]he people who read this language and become concerned about the membership clause tend to fail to read the latter part of that because I think it is very important language, and it is new, and something that has never been done in any other legislation, . . . [¶] [That language] gives to the Board the power to look into the internal workings of every labor organization that files under this Act and has any kind of activity wherein there is a complaint lodged against the labor organization because they are asking one of their members to do something that does not comport with *fairness* and with *due process.* Now, that is a tremendous power that labor organizations traditionally have never been willing

to give . . . to a board, . . ." (Senate Committee Hearing, *supra*, at p. 71; emphasis added.) Secretary Bird continued by way of a hypothetical: "[I]f there were an objection raised by a grower or a member of a labor organization, that the labor organization was not comporting with due process . . . the General Counsel would look into it and *the board would make a determination as to whether or not, in fact, it was fair*. So you have a tremendous power in here that you have given to the board *to insure that the labor organization acts fairly*, and I think in a lot a [*sic*] ways this amendment is an improvement upon the original bill." (*Id.*, at p. 74; emphasis added.)

It is clear to us that one purpose of the amendments to subdivision (c) of section 1153 was to give the Board power to oversee the substantive fairness of expulsions or suspensions, not simply to insure mechanical compliance with a union constitution or bylaws, as one reading of the literal language might suggest.[29] For example, the Board surely would not abdicate its review function if it found that the union's constitution or bylaws afforded little or no protections; it would impose those protections. Moreover, it is evident that the Board was meant to give meaning to the phrase "reasonable terms and conditions" on a case by case basis. Assemblyman Howard Berman, a co-author of the legislation, clearly

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[29] At the Senate committee hearing, attorney Jordan Bloom illustrated how empty a protection mere adherence to a constitution and bylaws could be: "You can . . . have a labor organization that has all the due process in the world. They have votes; they have meetings; everyone gets to say what they want to say; they take a vote and they say that anyone [who] didn't go to the demonstration is not in good standing and he's out. The decision was arrived at in a democratic way, but why should the employer be told to fire that guy because he preferred to work?" (Senate Committee Hearing, *supra*, at pp. 74-75.)

indicated that the Board must give life to the term "reasonable": [W]hat is the reason why an employee under a union security agreement keeps up his membership dues? Well, presumably . . . he is afraid of losing his job if he doesn't maintain his membership. The Board under this law has the authority to determine whether the reason that an individual is expelled from his union is reasonable . . . ." (Hearing before Assem. Ways and Means Com. on Agric. Lab. Rel. Act (Third Ex. Sess., May 27, 1975) p. 21; cf. Levy, *supra*, at p. 791 ["The exact parameters of these 'membership requirements' will have to be decided by the ALRB."].) There was even some question in committee whether the Board would exercise its authority so as to sanction expulsion or suspension for other than due-and-fees grounds.[30]

The foregoing history of the Act together with its actual language dictates our conclusion that terms and conditions of employment are not to be deemed "reasonable merely by reference to the intrinsic standard employed in the instant cases. If the only inquiry were whether a rule is "reasonably related to a legitimate

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[30] "JORDAN BLOOM: Why should the board have the authority to sanction the discharging of an employee for some reason other than a failure to tender dues or initiation fees?

"SENATOR GREENE: How do you know the board is going to do that?

"JORDAN BLOOM: It has the authority to do that in this law.

"SENATOR GREENE: But how do you know that it is going to make its determination in that direction rather in some other?

"JORDAN BLOOM: Why should it even have the authority to make that determination? That's my point.

"SENATOR GREENE: Well, I can tell you why it should have the authority as one vote on the bill. Because we decided to give it to them." (Senate Committee Hearing, *supra*, at p. 77.)

union interest that is germane to its role as a collective bargaining representative," then very few rules would be found unreasonable and the slightest legitimate union interest would always outweigh the worker's fundamental right to work for a living. This cannot have been the intent of the Act, as is evident from the concern expressed before and within the committees that considered the amendments.

We hold that, in cases of expulsion or suspension placed before the Board pursuant to section 1153, subdivision (c), review, an internal rule forming the basis for the underlying charge shall be deemed a "reasonable" term or condition of membership only if the Board determines (1) that the rule is reasonable in its relation to legitimate union goals and functions, and (2) that, after balancing union interest and the interests of the worker, application of the rule is reasonable in the particular case at hand. In determining that the rule is reasonable in its application, the Board must find that no less severe sanction than suspension or expulsion will, in that particular case and under the circumstances existing at the time of the disciplinary action, be effective to serve the union interests advanced by the rule.[31]

While the precise dimensions of the test must be left within the discretion of the Board, to be exercised in light of its evolving experience and expertise, the following nonexclusive factors should prove to have general relevance in the balance of the union's interests against

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[31] We emphasize that the test announced above is not the equivalent of a constitutional standard. Although the test requires examination of less restrictive alternatives, there is no requirement of a compelling union or governmental interest. (Cf. *Steelworkers* v. *Sadlowski*, *supra*. 457 U.S. 102, 111.)

the worker's rights. The union's interest might include, for example, the need for conformance with the rule, the importance of the goal which conformance serves, the threat to union solidarity imposed by the violation, the frequency and seriousness of such violations in general and as to the particular worker, and the probable curative effect of lesser sanctions than expulsion or suspension. Factors affecting the worker's interests might include his or her ability to find other employment, financial or other hardship which might have prompted the worker to violate the rule, the worker's awareness of wrongdoing and willingness to abide by the rule in the future, his or her tenure or other interests in maintaining present employment and the number or frequency of past rules violations. Should the Board determine that the rule in its application is not "reasonable," it may find it appropriate to return the member to the union's disciplinary processes for imposition of a lesser sanction so as not to deprive the union of all recourse against the worker.

* * *

DISPOSITION

We have rejected all of the petitioners' contentions challenging the Board's actions as to Pasillas, Martinez and Scarbrough. Real parties in interest Martinez and Scarbrough have not petitioned for review in their cases, petitioner Pasillas' failure to exhaust intra-union appeals procedures properly resulted in dismissal of his unfair labor practice allegations and petitioner UFW's challenges regarding all three of those parties lack merit. Accordingly, the order in 8 A.L.R.B. No. 103, as modified by the supplemental order in 9 A.L.R.B. No. 17, is

ordered enforced in full. That part of the Board's decision in 8 A.L.R.B. No. 103, finding that the UFW rules here at issue were "reasonable" (a conclusion not challenged directly by Pasillas, but indirectly challenged by Navarro and apparently adopted and relied upon by the Board in Navarro's case), is disapproved insofar as it is inconsistent with this opinion.

The claims of Navarro concerning retroactive application of the union security provision and her free speech and association rights, as well as the UFW's exhaustion of remedies argument, all lack merit. To that extent, we agree with the Board's decision, although we have concluded that the Board misconceived the extent of its review function under section 1153, subdivision (c), of the Act and therefore never undertook to balance the need for the penalty of suspension. However, the Board's decision is upholdable on the basis of its due process ruling alone. The decision in 8 A.L.R.B. No. 104 is therefore affirmed, and the order is enforced in full.

CERTIFIED FOR PUBLICATION

Smith, J.

WE CONCUR:

Kline, P. J.

Rouse, J.

APPENDIX B

Pertinent Extracts of the
Decision and Order
of the
State of California
Agricultural Labor Relations Board*

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* The Agricultural Labor Relations Board issued a 43-page decision in these three consolidated cases. For the sake of brevity, only those pages pertinent to this appeal have been reproduced in this appendix. The entire decision can be found at 8 A.L.R.B. No. 103 (1982).

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, AFL-CIO, *Respondent,* *and* SEVERO PASILLAS, JUAN MARTINEZ, and ODIS SCARBROUGH, Individuals, *Charging Parties.*	8 ALRB No. 103 Case Nos. 79-CL-59-SAL 80-CL-5-SAL 80-CL-4-SAL 80-CE-108-SAL 80-CE-29-SAL

DECISION AND ORDER

On October 9, 1981, Administrative Law Officer (ALO) William A. Rezneck issued the attached Decision in this proceeding. Thereafter, Respondent United Farm Workers of America, AFL-CIO (UFW) and Charging Parties Pasillas and Scarbrough each filed timely exceptions and a supporting brief. General Counsel, Respondent UFW, and Charging Parties Pasillas and Scarbrough each filed a reply brief.

The Agricultural Labor Relations Board (ALRB or Board) has considered the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO as modified herein, and to adopt his recommended Order with modifications.

Introduction

The issue before us in this matter, as in one previous case,[1] concerns the scope of a union's power to regulate the conduct of its members through membership requirements and the nature of the procedural protections which must attend any denial or termination of an employee's membership status by the union. This Board becomes involved in these internal union affairs by virtue of Labor Code sections 1153(c) and 1154(b). Section 1153(c) makes it an unfair labor practice for an employer:

> By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization.
>
> Nothing in this part, or in any other statute of this state, shall preclude an agricultural employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this section as an unfair labor practice) to require as a condition of employment, membership therein on or after the fifth day following the beginning of such employment, or the effective date of such agreement whichever is later, if such labor organization is the representative of the agricultural employees as provided in Section 1156 in the appropriate collective-bargaining unit covered by such agreement. No employee who has been required to pay dues to a labor organization by virtue of his employment as an agricultural worker

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[1] See, *United Farm Workers of America, AFL-CIO (Jesus Conchola)* (Mar. 19, 1980) 6 ALRB No. 17. (Hereafter cited as *UFW (Conchola).*)

> during any calendar month, shall be required to pay dues to another labor organization by virtue of similar employment during such month. For purposes of this chapter, membership shall mean the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing; provided, that such membership shall not be denied or terminated except in compliance with a constitution or bylaws which afford full and fair rights to speech, assembly, and equal voting and membership privileges for all members, and which contain adequate procedures to assure due process to members and applicants for membership.[2]

Labor Code section 1154(b) makes it an unfair labor practice for a union:

> To cause or attempt to cause an agricultural employer to discriminate against an employee in violation of subdivision (c) of Section 1153, or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated for reasons other than failure to satisfy the membership requirements specified in subdivision (c) of Section 1153.

In the present case, we are called upon to determine in this matter whether the UFW's constitutional provision

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[2] This provision is modeled after section 8(a)(3) of the National Labor Relations Act (NLRA) with one significant difference. Under NLRA section 8(a)(3), an employer may not discriminate against an employee for nonmembership in a union "if he has reasonable grounds for believing that membership was denied or terminated for reasons other than *the failure of the employee to tender the periodic dues and the initiation fees* uniformly required as a condition of acquiring or retaining membership."

requiring all members to honor its strikes and picket lines is a reasonable term or condition of continued membership, and whether the UFW has afforded the Charging Parties due process before terminating their membership in the Union.

Charging Parties were employed as agricultural employees by agricultural employers Mann Packing and Sun Harvest when strikes and picketing began against a number of lettuce growers in January 1979 after strike votes by a majority of the employees at those companies. Although each Charging Party joined the strike initially, each subsequently returned to work while the strike and picketing were still in progress.[3] At the time the Charging Parties returned to work, they were members of the UFW. Also at that time, the UFW Constitution, article XVIII, section 4 required that all members honor duly-authorized strikes and refrain from crossing UFW picket lines.

On September 4, 1979, separate collective-bargaining agreements were reached between the UFW and each of the two employers. Each contract contained a union-security clause requiring, as a condition of continued employment, that all employees become and remain members in good standing of the UFW. After the striking employees returned to work, charges were brought by union members against the Charging Parties, alleging

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[3] Scarbrough and Pasillas, who both worked for Sun Harvest, returned to their pre-strike jobs in March and June 1979, respectively. Martinez, who had been employed by Mann Packing at the time the strike began, crossed a UFW picket line at Grower's Exchange, another struck company, in September 1979.

that they had violated the union constitution by failing to honor the UFW strikes and picket lines by working for struck employers during the strike. The Charging Parties were thereafter tried by their Ranch Communities, found guilty as charged, and ordered to be expelled from the union.[4]

Charging Party Pasillas did not appeal his October 2 expulsion and on October 30, 1979, the UFW informed Sun Harvest that, as he was no longer a member in good standing, the Union was requesting his discharge. Accordingly, Sun Harvest discharged Pasillas on November 2, 1979.

Charging Party Martinez appealed his November 9 expulsion to the National Executive Board (NEB) of the UFW on November 13, which resulted in an automatic stay of the Ranch Community's order of expulsion.[5] On January 2, 1980, Martinez' penalty was reduced by the NEB to a one-year suspension. However, after the UFW gave notice to Mann Packing on January 10 that his membership had been suspended, and requested his discharge, Mann Packing discharged him on January 14, 1980.

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[4] Pasillas was charged and served with notice of his trial on September 24, and tried on October 2, 1979. Martinez was charged on October 30, served with a trial notice on November 2 and tried on November 9, 1979. Scarbrough was charged and served with a trial notice October 3 and tried on October 11, 1979.

[5] The UFW constitution article XX, section 1(d) states as follows:

> When the appellant has been convicted and reprimanded, censured, suspended or reprimanded or censured or suspended or expelled from membership, such penalty shall not be enforced pending final decision by the National Executive Board on any appeal filed as provided in this Section.

On October 29, 1979, Charging Party Scarbrough also appealed to the NEB and obtained a reduction in his penalty to a two-year suspension on January 2, 1980. On January 8, the UFW notified Sun Harvest that Scarbrough's membership had been suspended and requested his discharge. Sun Harvest discharged him on the same day. Scarbrough then appealed to the UFW's Public Review Board (PRB) and on April 20, 1981, obtained a complete reversal of the trial decision on procedural grounds.[6] Scarbrough was subsequently restored to membership in good standing and reinstated by Sun Harvest, although the date of his reinstatement does not appear in the record. As of the date the hearing herein was closed, Scarbrough had not been made whole by either the UFW or Sun Harvest for any losses suffered as a result of his January 1980 discharge.[7]

The Constitutionality of Section 1153(c)

Charging Parties Pasillas and Scarbrough except to the ALO's failure to conclude that requiring membership in a labor organization, as a condition of continued

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[6] The PRB found that ". . . the Union failed to provide proof of membership in the ranch community of those voting at the time the vote (to expel) was taken" and also that an incomplete trial record was kept.

[7] The decision of the PRB as to Scarbrough, the Union's request that he be reinstated, and his actual reinstatement by Sun Harvest all occurred after the hearing in this case was closed. The ALO found that these events occurred, apparently based on documents submitted in support of Respondent's motions for partial dismissal and to reopen the hearing, both of which were denied by the ALO. Although a formal motion to reopen the record to admit this new evidence would have been appropriate, the parties have not excepted to the ALO's reliance on these documents. We will therefore assume that these facts are not in dispute and adopt the ALO's findings.

employment, denies employees the right to work in the jobs of their choice and their First Amendment freedom to refrain from associating with the Union.[8] Charging Parties argue that by sanctioning compulsory union membership, section 1153(c) also violates employees' constitutional rights.

Article III, section 3.5 of the California Constitution, added by referendum on June 6, 1978, forbids any administrative agency to declare a state statute unconstitutional.[9] We therefore lack authority to rule on the Charging Parties' challenges to the constitutionality of the good standing provision in section 1153(c). We believe, however, that section 1153(c) comports with the constitutional standards articulated in numerous cases by the United States Supreme Court and the California Supreme Court. In *Railway Employees' Dept* v. *Hanson* (1956) 351 U.S. 225, for example, the Court held that the right to work is not absolute and that it was reasonable for a legislature to regulate employment opportunities by

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[8] Charging Parties argue that mandatory union membership under any circumstances is unconstitutional. They also argue that the particular membership requirement at issue here (i.e., honoring UFW strikes and picket lines) is unconstitutional because it violates the workers' right to not associate with a strike. Our response to each of these constitutional arguments is the same.

[9] Article III, section 3.5 of the California Constitution, enacted by referendum on June 6, 1978, provides in pertinent part:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: (a) To declare a statute enforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; (b) To declare a statute unconstitutional.

allowing the negotiation of mandatory-union-membership clauses in collective bargaining agreements.

The Court's reasoning in *Hanson* appears applicable to the language of section 1153(c) which permits union-security agreements requiring union membership in good standing as a condition of continued employment. The policy stated in ALRA section 1140.2 of encouraging and protecting agricultural employees' rights to full freedom of association and to engage in collective bargaining with their employers is clearly a rational purpose for the exercise of the Legislature's authority. Moreover, the "good standing" proviso to section 1153(c) of the Act, reasonably calculated to promote implementation of that policy, presents a reasonable limitation on the right to work and the right to freedom of association. Other authoritative rulings upholding legislatively imposed limitations on the right to work and the freedom of association, which need not be discussed at length here, similarly support the validity of section 1153(c). (See, e.g., *NLRB* v. *Allis-Chalmers Manufacturing Co.* (1967) 388 U.S. 175; *Abood* v. *Detroit Bd. of Education* (1977) 431 U.S. 209; *Pinsker* v. *Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541.)

The Statutory Scheme of Section 1153(c)

As stated above, Labor Code section 1153(c) gives a labor organization representing agricultural employees the right, under a union security agreement, to require those employees to become and remain members of the union in good standing as a condition of continued employment. Section 1153(c) limits in two ways the

power it thus vests in the union: first, all union membership requirements must be reasonable and uniformly applicable to all union members, and, second, union membership may not be terminated except pursuant to fair internal union procedures which protect basic rights. If these limits are exceeded, then this Board will find that the union's actions in terminating an employee's membership and employment rights violate section 1154(b) and (a)(1).

In our advisory opinion in *UFW (Jesus Conchola)* (Mar. 19, 1980) 6 ALRB No. 16, we noted that union security agreements permitted by section 1153(c) allow unions to exercise control over their member's employment opportunities, and we referred to the California Supreme Court's discussion of such control in *Gay Law Students Association* v. *Pacific Telephone and Telegraph Co.* (1979) 24 Cal.3d 458. The court there observed that a union afforded monopolistic control over employment by law "is not free to exercise its power arbitrarily." (24 Cal.3d at p. 476.) The court relied heavily on the earlier case *James* v. *Marinship Corp.* (1944) 25 Cal.2d 721, in which it had stated that "Where a union has . . . attained a monopoly of the supply of labor . . . such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations," 25 Cal.2d at p. 731, and that by well-established common law principle,

> . . . the holders of the monopoly must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others. The nature of the monopoly determines the nature of the duty. (25 Cal.2d at p. 732.)

The principle that a union's control over the supply of labor implies a corresponding duty and must be exercised fairly was recognized and given effect in the drafting and enactment of section 1153(c). As we pointed out in *Conchola, supra*, 6 ALRB No. 16, Assemblyman Howard Berman, an author of the Act, testifying on this section before the Assembly Ways and Means Committee on May 27, 1975, stated that the section gives the Agricultural Labor Relations Board (Board) authority to determine whether the basis for expulsion of a member by a union was "reasonable."[10] Another of the drafters of the Act, then Secretary of Agriculture and Services Rose Bird, testified before the Senate Industrial Relations Committee that the oversight authority given by section 1153(c) to this Board to assure fair and reasonable internal union disciplinary procedures "is a tremendous power that labor organizations traditionally have never been willing to give to a board, and, in effect, this language is giving to the board that power, and . . . this would allow the board, in extreme cases, to even go so far as to decertify a union if, in fact, they're carrying on practices that [are unacceptable]."[11]

By authorizing this Board to review internal union disciplinary procedures for fairness and reasonableness, section 1153(c) implements the balance at which the common law has traditionally aimed, i.e., the balance between enjoyment of monopolistic or quasi-monopolistic control over employment opportunities and the duty of

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[10] Hearings on Senate Bill No. 1 before the Assembly Ways and Means Committee on May 27, 1975, p. 5.

[11] Hearings on Senate Bill No. 1 before the Senate Industrial Relations Committee on May 21, 1975, pp. 71-72.

restraint and even-handedness in the exercise of that control. We shall carry out our oversight role with close attention, on a case-by-case basis, to the facts presented and the circumstances from which each such case arises.

The Reasonableness of the UFW's Membership Requirements

We conclude from the legislative history of section 1153(c) of the Act that the Legislature intended to give agricultural employee unions the power to require their members to honor union authorized strikes and picket lines as a condition of continued good standing and continued employment. In a public hearing before the Senate Industrial Relations Committee on May 21, 1975, Jordan Bloom, an attorney representing a number of agricultural employers, testified as follows regarding the good standing provision which had been amended into Senate Bill No. 1:

> JORDAN BLOOM: . . . Section 1153(c) and 1154(b) have been amended to entitle a union . . . to be the sole judge of the good standing of its membership and for any reason it deems appropriate under by-laws and constitutions drafted by it to tell their grower that that member is no longer a member in good standing and the employee should be discharged. Now, I am not speaking of scare stories here. This has happened time and time again from 1970 through April 15 of 1973 where *union members refused to go to a demonstration or refused to carry out the orders of the leadership the collective bargaining agreements provided that the union was the sole judge of the member's good-standing and the employer was told to fire those employees.*

> Now, this bill as initially drafted, the drafters recognized that the premise provided for in the National Labor Relations Act, the objective premise, not subjective, that you can only cause an employer to discriminate against an employee for the employee's failure to tender dues and initiation fees uniformly required as a condition of membership. [*sic*] That's pure and simple' [*sic*] either he's paid his dues or he hasn't paid his dues. *Not that he hasn't gone to a meeting or he hasn't taken an oath of allegiance or he hasn't gone to a demonstration.* I think opening this up for this kind of subjective evaluation of an employee's duties and obligations to a union and allowing the union to tell the employer to fire the employee for whatever reason, especially when that grower does not have anything to say about the drafting of those by-laws or that constitution is inherently discriminatory, and I'm speaking, you understand, from the growers' standpoint.
> (Emphasis added.)
> (See, Transcript of Senate Hearing at p. 68-69.)

Following this explanation of the historical application of the good standing clause by the UFW, then Secretary of Agriculture Rose Bird explained to the committee that ALRB review of union membership requirements would protect farm workers from "arbitrary" union requirements. (See, Transcript of Senate Hearing at p. 72.) Senator Stull then moved that section 1153(c) of S.B. 1 be amended to eliminate the good standing language and return to conformity with NLRA section 8(a)(3). With Jordan Bloom's statements as to the likely effect of the good standing language in mind, the Senate committee then rejected the Stull amendment.

This history indicates that the Legislature understood

and intended that, under section 1153(c), agricultural unions would be able to require a good deal more of their members than simply the payment of dues, as under NLRA section 8(a)(3). The determination as to how much more could be required was left to the case-by-case review of this Board. Although the Board's discretion in this area is broad, we are instructed that only union membership requirements which are fair and reasonable may be enforced through expulsion from the union and termination of employment under a union security agreement.

In *UFW (Conchola), supra*, 6 ALRB No. 16, we held that the union could not require that its members contribute to a fund which was used for contributions to political candidates or for political or ideological purposes that are not germane to collective bargaining. In that case, we distinguished between union expenditures for medical or educational benefits which provide for the general welfare of the membership, and purely political or ideological expenditures which have no direct relationship to the overall purposes that the union could serve through collective bargaining.[12]

In this case, the question is whether the UFW's requirement regarding the honoring of picket lines and strikes is reasonably related to a legitimate union interest

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[12] Member McCarthy in suggesting that any minimal union interest would be endorsed under the majority view, overlooks the *Conchola* case, where the Board limited the application of a UFW membership requirement. Although his dissent's call for "balance" is alluring, it is clear that the Legislature has struck a balance which the majority has acknowledged in this case and that the dissent, in reality, is merely lamenting the Legislature's failure to strike the balance as the dissent would find appropriate.

that is germane to its role as collective bargaining representative.[13] We are convinced that the ability to enforce disciplinary rules during a strike is necessary for a union to be able to carry out its duties as the employees' representative.[14]

The reasonableness and legitimacy of a union's interest in maintaining discipline among its members during a strike was recognized in *NLRB* v. *Allis-Chalmers Manufacturing Co., supra*, 388 U.S. 175. The U.S. Supreme Court there stated, with regard to a union-imposed fine for crossing a picket line,

> Integral to this federal labor policy has been the

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[13] This standard of review, which we find in the express terms of section 1153(c), is consistent with *United Steel Workers of America* v. *Sadlowski* (1982) ____ U.S. ____ [110 LRRM 2609] in which the U.S. Supreme Court held that federal court review of internal union rules under section 101(a) of the Labor Management Reporting and Disclosure Act (29 U.S.C. section 411(a) is limited to determining whether the rules are reasonably related to a valid union interest. It is also consistent with the California cases which hold that an organization's membership requirement which is reasonably related to the legitimate goals of the organization will not be disturbed, unless the requirement is "contrary to established public policy" or is "patently arbitrary and unreasonable." (*Pinsker* v. *Pacific Coast Society of Orthodontists, supra*, 12 Cal.3d 541, 558.)

[14] Although the issue is not raised by the facts of these cases, in order to make our position as clear as possible, we point out that we agree with the ALO that a union rule prohibiting members from filing charges or suits against the union would not be reasonable under section 1153(c). A labor organization's interest in a united effort against the employer in a strike is different from a labor organization's desire for unchallenged loyalty and obedience in all matters. We would hold, consistent with federal authority, that the public policy favoring free and equal access to the administrative process outweighs a union's interest in total unanimity (See, *NLRB* v. *Marine Workers* (1978) 391 U.S. 418; *NLRB* v. *Local 212, United Auto Workers* (6th Cir. 1982) ____ F.2d ____ [111 LRRM 2529].)

> power in the chosen union to protect against erosion of its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . ." Provisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments. [Footnotes omitted.]
> (388 U.S. at 181.)

The conviction that "the power to . . . expel strikebreakers is essential if the union is to be an effective bargaining agent" was, we believe, an active motivating consideration in the Legislature's enactment of section 1153(c).

Member McCarthy argues in dissent that since the right of an individual employee to refrain from participating in a strike is protected by section 1152 of the Act, this Board may not sanction the punitive loss of employment for exercising that right. Section 1152 reads as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities*

> *except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153.* (Emphasis added.)

We are aware that two fundamental purposes of the Act — encouragement of collective activity and protection of individual rights of association — cannot always be neatly reconciled and are, in fact, in direct conflict in this case. However, we believe the underscored language in section 1152 and the legislative history of section 1153(c) indicate the Legislature's intention that where the union has imposed a membership requirement that is reasonably related to its role in collective bargaining, including its role in exerting economic pressure on the employer, the collective interest of the union and all the striking employee-members supersedes the right of an individual employee to refrain from engaging in union or concerted activity. Moreover, since the Legislature contemplated that termination of employment under a union security agreement could result from loss of good standing, it is not for this Board to say that loss of employment is too harsh a penalty for crossing a picket line during a strike.

Procedural Due Process

Having concluded that the UFW's picket line requirement is reasonable, we must now inquire whether the expulsion procedures of the Union provided adequate due process. As mentioned above, Labor Code section 1153(c) states that a labor organization shall not deny or terminate union membership ". . . except in compliance

with a [union] constitution or bylaws which . . . contain adequate procedures to assure due process to members and applicants for membership." We interpret that language as requiring unions to provide the basic elements of a fair hearing, i.e., prior notice and an opportunity to prepare and present evidence. This interpretation is supported by both state and federal precedent which states that standards of procedural fastidiousness which apply to criminal or civil litigation in the courts need not be met by internal union procedures. (See, *Cason* v. *Glass Bottle Blowers Assn.* (1951) 37 Cal.2d 134 and *Tincher* v. *Piasecki* (7th Cir. 1975) 520 F.2d 851.) We have reviewed the UFW's constitutional procedures for hearing and resolving charges against union members and find those procedures, on their face, to be adequately fair.[15]

Charging Parties also except to the ALO's failure to find that it was unlawful for the UFW to apply its disciplinary procedures retroactively and his failure to find that the charges against Charging Parties were untimely, based on the UFW's own 60-day limitation. These

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[15] The UFW constitution (articles XVIII-XXI) describes an internal review procedure that provides as follows: a) any member may file written charges alleging a violation of another member's obligations with the Ranch Committee within 60 days of the violation; b) the accused member must receive notice of the charges at least seven days before the trial; c) the accused must be tried before the Ranch Committee in the presence of the ranch community; d) the trial must be impartial and fair with full opportunities to examine witnesses and present evidence; e) a faithful and accurate record must be kept; f) a convicted member may appeal to the National Executive Board (NEB) within 15 days after the trial; g) the NEB must decide within 30 days after receipt of the appeal; h) the member may appeal the NEB decision to the Public Review Board (PRB) or National Convention within 15 days after receipt of the NEB decision; i) appeal to the NEB stays the enforcement of trial decision but appeal to the PRB does not.

exceptions are without merit. Charging Parties were voluntary members of the Union at the time they committed the violations and they were therefore subject to its rules at that time. A violation of the UFW constitution was committed by each Charging Party each working day from his return to work until the end of the strike. The internal union charges were clearly filed within 60 days after the last such violation by each Charging Party and were therefore timely.

Exhaustion of Internal Union Procedures

We must determine the extent to which union members who are found to have violated union rules, and are thereafter expelled from membership and discharged from their jobs for loss of "good standing," must exhaust their internal union appeals before this Board will proceed against the employer, under section 1153(c), or against the union, under section 1154(b).

Although our Act is, in many respects, similar to the National Labor Relations Act (NLRA), the NLRA contains no provision like section 1153(c). We believe, however, that we will be giving effect to the spirit of ALRA section 1148, which requires that we follow NLRA precedent "where applicable," if we look to federal cases applying NLRA section 301 (which allows an employee to sue the union for breach of the duty of fair representation) and section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), also known as the Landrum-Griffin Act (29 U.S.C. section 411(a)(4),[16] when we decide cases arising under section 1153(c).

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[16] Section 101 (a) of the LMRDA provides:

Protection of the Right To Sue. -No labor organization

In *NLRB* v. *Marine Workers, supra*, 391 U.S. 418, the Court held that, despite a general preference for private resolution of disputes, federal district courts have discretion to excuse exhaustion of internal union procedures in suits arising under the LMRDA.[17]

In *Clayton* v. *Automobile Workers* (1981) 451 U.S. 679, a case arising under NLRA section 301, the Court stated three factors for courts to consider in exercising

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> shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

[17] The *Marine Workers* case involved an employee who filed charges with the NLRB alleging misconduct by a union official. After being disciplined by the union for filing those charges, the employee filed new charges alleging the illegality of the disciplinary action, without attempting to appeal the discipline through internal union procedures. The court held that the employee had no obligation to exhaust union procedures, since the union had no legitimate interest in denying the employee access to the NLRB. This rule, which we adopt, makes good sense. An employee who is expelled from the union pursuant to an unreasonable rule need not appeal that expulsion through internal union procedures. (See, *NLRB* v. *Local 212, UAW, supra*, _____ F.2d _____.)

their discretion:

> . . . first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust.

We find these factors appropriate for reviewing cases arising under Labor Code section 1153(c) or 1154(b) and we affirm the ALO's conclusion that exhaustion of internal union procedures is required, except where the *Clayton* factors apply.[18] We do not agree, however, that the four-month limit on exhaustion of internal union procedures found in section 104(a)(4) of the LMRDA, is strictly applicable. In most cases internal appeals should

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[18] The general California practice regarding court review of the internal affairs of quasi-monopolistic associations is similar in its initial preference for internal solutions to internal problems. In *Pinsker* v. *Pacific Coast Society of Orthodontists, supra*, 12 Cal.3d 541, 557, a case in which a member of the society was expelled with no hearing, the court of appeal responded to an argument that no remand was necessary, since the member had had a court trial as follows:

> . . . we believe as a matter of policy that the association itself should in the first instance pass on the merits of an individual's application rather than shift this burden to the courts. For courts to undertake the task "routinely in every such case constitutes both an intrusion into the internal affairs of [private associations] and an unwise burden on judicial administration of the courts." (*Ferguson* v. *Thomas* (5th Cir. 1970) 430 F.2d 852, 858.)

be exhausted within four months; in any event, the question of undue or unfair delay by the union is adequately addressed in the *Clayton* factors.

In the instant case, Charging Parties Pasillas and Martinez failed to exhaust their internal union appeals before filing charges with the ALRB. Although Pasillas was expelled from the Union on October 2, 1979, he did not appeal that action to the NEB or the PRB, but elected to file a charge with the ALRB on November 7, 1979. Although Martinez appealed his November 9, 1979, expulsion to the NEB, and obtained a decision reducing his punishment on January 2, 1980, he did not thereafter appeal to the PRB, but chose to file a charge with the ALRB on March 14, 1980.

Charging Party Scarbrough, in contrast to Pasillas and Martinez, appealed his expulsion of October 11, 1979, to both the NEB and PRB. When the NEB reduced Scarbrough's expulsion to a two-year suspension on January 2, 1980, he appealed to the PRB, which ultimately reversed the trial decision completely on procedural grounds and restored Scarbrough to union membership in good standing. Scarbrough was thereafter reinstated by Sun Harvest, although as of the date the hearing in this case closed, he had not been made whole for lost wages. Since Scarbrough utilized all of the UFW appeal procedures, he has adequately exhausted internal union remedies.

We agree with the ALO that, based on the *Clayton* case,[9] Martinez' failure to appeal to the PRB was reason-

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[9] In *Clayton*, an employee sued his union for failing to take his grievance to arbitration and his employer for the relief he sought in his

able because, at the UFW's request, he was discharged by Mann Packing on January 14, 1980. Since the Union lacked legal means to require that Respondent Mann Packing Co. reinstate Martinez to his former job with his former seniority, only unfair labor practice charges against both the UFW and Mann Packing could result in the full relief sought by Martinez.[20] As to Pasillas, who neither attended his trial nor appealed to the NEB, we find an inexcusable failure to exhaust internal union procedures. Pasillas could have defended himself and might have avoided expulsion from the Union by using the internal union procedures. However, Pasillas simply declined to use those procedures without demonstrating that he had any reason to believe that a defense or an appeal would be futile. If this Board's remedial authority were available to an employee under these circumstances, then exhaustion of internal union procedures would be meaningless and our desire to encourage, to the greatest extent possible, the internal resolution of union disciplinary disputes would be thwarted. Since Pasillas failed to adequately exhaust internal union

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original grievance, including full reinstatement. The Court held that since the union had no power to give Clayton reinstatement (the employer having fired him for cause), requiring Clayton to first exhaust the union procedures, where he could obtain only a partial remedy, would unfairly subject him to multiple litigation of his grievance. The court held that, under such circumstances, a federal district court could take immediate jurisdiction over Clayton's suit.

[20] Although we find, as a matter of law, that an employee need not appeal to the PRB as a pre-condition to this agency proceeding with unfair labor practice charges, we note that employees who appealed to the PRB to date have obtained reversals of their expulsions in at least six of eight cases. Since these employees were subsequently returned to membership in good standing in the Union and, at the Union's request, reinstated by their employer, it appears that appeal to the PRB is effective and, perhaps, more expeditious than appeal to this agency.

appeal procedures, the portion of the complaint which relates to him is dismissed.

* * *

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Mann Packing Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against, any agricultural employee with respect to whom membership in the United Farm Workers of America, AFL-CIO (UFW) has been suspended, terminated, or denied without the due process rights guaranteed by section 1153(c) of the Agricultural Labor Relations Act (Act).

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act.

(a) Offer to Juan Martinez immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights or privileges.

(b) Preserve and, upon request, make available to this Board and its agents, for examination, photocopy-

ing, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amounts of backpay due under the terms of our Order issued on this date against the UFW.

(c) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(d) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: December 30, 1982

ALFRED H. SONG, Chairman

HERBERT A. PERRY, Member

* * *

MEMBER McCARTHY, Dissenting:

In validating a union rule which subjects nonstriking workers to expulsion from the union and termination of employment, the majority has sanctioned economic capital punishment for agricultural employees who attempt to exercise their Labor Code section 1152 ". . . right to refrain from any or all [union] activities . . .," and has thereby abused the discretion vested in this Board by section 1153(c) of the Agricultural Labor Relations Act (Act). The majority has achieved this result by construing Labor Code section 1152 in such a manner that the exception contained therein swallows the rule. I am convinced that the Legislature intended that this Board exercise its discretion in a manner which, while allowing for meaningful good standing provisions, gives the fullest possible effect to the basic rights guaranteed to employees by the Act.

Section 1152 of the Act contains an exception which allows the worker's fundamental right to refrain from any or all union activities to be "affected by an agreement requiring membership in a labor organization as a condition of continued employment . . . ." However, it is by no means an unbridled exception. "Membership" is defined in Labor Code section 1153(c) as ". . . the satisfaction of all *reasonable* terms and conditions uniformly applicable to other members in good standing . . . ." (Emphasis added.) I submit that a union rule requiring a worker to participate in a strike and/or picketing against his or her employer, on pain of expulsion from the union, is clearly an unreasonable condition of membership that is not to be countenanced under Labor Code sections 1152 and 1153(c) insofar as it can result in

termination of employment.[1]

Where the contract between the union and the employer contains a "good standing" provision, the union may require the employer to discharge any employee who has failed to maintain his or her union membership in good standing. Under the union rules at issue in this case, the union may expel from membership any member who fails to honor a union picket line or continues working for an employer during the union's strike against the employer. Imposition of this penalty of expulsion makes it possible for the union to require the employer to discharge the employee pursuant to the terms of the good standing provision in the contract. The employee may have worked many years for the struck employer and may have attained a level of seniority, income, security, and benefits that he or she cannot

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[1] The majority claims that *NLRB* v. *Allis-Chalmers Mfg. Co.* (1967) 388 U.S. 175 [65 LRRM 2449] supports the reasonableness of having a worker fired for crossing a picket line. However, the majority fails to mention that the Supreme Court predicated its holding in that case on a very significant fact: the union discipline did not interfere with the employer-employee relationship. (See also *NLRB* v. *Boeing Co.* (1978) 412 U.S. 67 [82 LRRM 2183].) The opposite is true here; the union discipline *includes* loss of employment. Under the National Labor Relations Act (NLRA), a union cannot require an employer to discharge an employee because the employee engaged in, or refrained from, any union activity, or violated any union rule, bylaw, or constitution. Under the NLRA, a union may lawfully require the employer to discharge an employee only for failure to pay initiation fees and or union dues, and may expel or discipline, but may *not* require the discharge of, a member for violation of union rules. Because the ALRA makes it possible to have an employee's continued employment contingent on compliance with union rules, the inhibition against review of union-imposed penalties that exists under the NLRA does not apply here, where the employee's livelihood, not merely his union membership, is in jeopardy.

replicate elsewhere. Moreover, the expelled and discharged employee faces a situation akin to the pre-1935 blacklisting abuses which antiunion employers perpetrated against union activists. If an employee has been expelled from a union for conduct which the union deems to be contrary to its interests, he or she presumably will not be readmitted to the union simply by going to work for a different employer who has a contract with the union. All employers having a contract which contains a good standing provision would be off limits as a potential source of employment for the expelled employee. In any given geographical area, many or all of the agricultural employers who could otherwise utilize the skills of the expelled worker would be subject to such a contract, and therefore would be unable to retain that individual as an employee as long as he or she remained in a suspended or expelled status. As one union currently represents a large majority of the organized employees in California's agricultural industry, any expelled and discharged worker would be gravely disadvantaged in obtaining other employment. The consequent economic disaster and disruption of the worker's life is an inordinately high price to pay for an act or conduct which may have been dictated by principles or dire economic necessity.

The majority would find any term or condition maintaining good standing union membership to be reasonable so long as it is "reasonably related to a union interest that is germane to its role as collective bargaining representative."[2] That definition is so broad as to be

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[2] The majority cites the recent Supreme Court case of *United Steelworkers* v. *Sadlowski* (1982) 102 Supreme Ct. 2339 in support of its

useless. Virtually everything the union does has some rational connection with its desire to increase its strength as a collective bargaining representative. Moreover, the majority's definition totally ignores the degree to which the fundamental statutory rights of employees are involved. Any legitimate institutional *interest* of the union, no matter how minimal, will, under the approach taken by the majority, always outweigh the individual employee's fundamental statutory *right* ". . . to refrain

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contention that an internal union rule need only be reasonably related to a valid union interest in order for that rule to be considered reasonable. However, resolving the question of whether a union rule is reasonably related to a valid union interest is in no way dispositive of whether the rule is in fact reasonable. *Sadlowski* involved a rule that prohibits candidates for union office from accepting campaign contributions from individuals who are not members of the Union. The court's task was to determine whether the rule was "reasonable," as that term is used under section 101(a) of the Labor Management Reporting and Disclosure Act. Its analysis rests heavily on the fact that, although the union's outsider rule does affect rights protected by the statute and may limit somewhat the ability of insurgent union members to wage an effective campaign against incumbent officers, "as a practical matter the impact may not be substantial." (*Id.* at p. 2346.) The court gave a number of substantive reasons why the impact of the rule would be mitigated and why alternative measures would not be as effective in curtailing undue influence of union affairs by nonmembers. This is in sharp contrast to the situation in the case at hand. Other than the mere possibility that a union member's conviction and expulsion might be reversed on appeal, there is nothing in the circumstances present here that make the impact of the rule anything less than devastating. Moreover, there are other effective means by which the union can discourage picket line crossings and attain strike solidarity. Finally, it should be noted that the interest to be protected in this case—the right to either engage in union activity—is even more fundamental than the union member's interest in being able to compete as effectively as possible when seeking to wrest a union office from an incumbent. The other case cited by the majority in support of its standard of review, *James* v. *Marinship Corp.* (1944) 24 Cal.2d 721, is inapposite on this point because the court was not called upon to construe a statutory requirement of reasonableness.

from any or all of such [union activities or other concerted] activities." The failure to even balance employee rights against union interests produces a one-sided equation that can hardly be considered a reasonable or just construction or interpretation of a statute which we all agree was intended to be a bill of rights for agricultural employees, not for agricultural unions or agricultural employers.

The majority makes much of the fact that the Legislature included the exception to Labor Code section 1152 with the knowledge that a union could expel a worker for failure to abide by certain of the union's terms or conditions of membership and then require the employer to discharge the employee from his or her job under the terms of a union-security agreement. There are many acts of an employee that a union might choose to make punishable, and there are many forms of discipline a union might choose to impose, e.g., fines, suspension of certain privileges. The problem here is that the Union is attempting to impose the severest possible penalty (loss of employment) for an act that goes to the heart of an employee's rights under the ALRA. In this fashion, the Union renders unreasonable its rule prohibiting members from crossing its picket lines or working for a struck employer. When, as in the instant case, the Board endorses the Union's imposition of the ultimate penalty for the exercise of a fundamental statutory right, that right is defeated and rendered meaningless. This cannot have been the result that the Legislature intended under the Labor Code section 1152 exception to the right to refrain from union activity.[3] Indeed, to ensure that such

[3] The literal interpretation which the majority gives to the Labor Code section 1152 exception does not comport with accepted principles of

pernicious results do not occur, the Legislature provided for a test of reasonableness to be applied to all union membership rules. Regardless of whether the Legislature intended that the Act should permit a union to require the discharge of an employee because of a violation of union membership rules, it plainly intended for the Board to determine in such cases whether there is any reasonableness in allowing an employer to be discharged for exercising one of the two fundamental rights (to engage in and to refrain from engaging in, union activity) guaranteed to all employees by the Act. This is made clear in the following dialogue between a member of the Senate Industrial Relations Committee and the witness whose testimony before that committee was

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statutory construction.

> The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature and if the words are sufficiently flexible to admit of a construction which will effectuate the legislative intention. The intention prevails over the letter, and the letter must if possible be read so as to conform to the spirit of the act. "While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of such words. Thus words or clauses may be enlarged or restricted to harmonize with other provisions of an act. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense were they intended to be understood or what understanding do they convey as used in the particular act. [Footnote omitted.]
> (Sutherland, *Statutory Construction*, § 46.07 (4th Ed.)

The particular rule in California is that an exception in a statute is to be strictly (narrowly) construed. (*Goins* v. *Board of Pension Com'rs of Los Angeles* (1979) 96 Cal.App.3d 1005, 158 Cal.Rptr. 470.)

quoted in part in the majority opinion:

JORDAN BLOOM: Why should the board have the authority to sanction the discharging of an employee for some reason other than a failure to tender dues or initiation fees?

SENATOR GREENE: How do you know the board is going to do that?

JORDAN BLOOM: It has the authority to do that in this law.

SENATOR GREENE: But how do you know that it is going to make its determination in that direction rather than in some other?

It was thus expected that this Board would exercise its discretion in such matters and not simply endorse or ratify every attempt by a union to expel a member and cause him to be discharged from his job for daring to exercise his statutory rights, the very rights which the Board is charged with protecting and enforcing.

It is clear to me that a balancing process is essential to a test of the reasonableness of union rules and the exercise of the Board's discretion under Labor Code section 1153(c). The union's institutional interest in strike solidarity must be balanced against the employee's Labor Code section 1152 right to refrain from engaging in union activity. In balancing conflicting interests we are guided by the principle that an accommodation must be achieved "with as little destruction of one as is consistent

with the maintenance of the other." (*NLRB* v. *Babcock & Wilcox Co.* (1956) 351 U.S. 105, 112.) The proper result then would be to afford the union an adequate opportunity to fulfill its legitimate objective while diminishing as little as possible the employee's Labor Code section 1152 right to refrain from union activity. Such a result has been eschewed by the majority, although it can easily be achieved in this case. Strike solidarity need not depend on the economic ruination of any employee who crosses the union's picket line. For example, noncoercive peer pressure and union persuasion would tend to minimize picket line crossings, as would a system of fines or other intraunion penalties which do not destroy or affect the employment status. Such penalties might constitute an infringement on the worker's Labor Code section 1152 rights, but both strike solidarity and the worker's right to earn a livelihood would be preserved. The case for proper accommodation of the competing rights or interests was succinctly stated in a concurring opinion from a recent NLRB case, *Machinists Local 1327, Internat'l Ass'n of Machinists & Aerospace Workers* (1982) 263 NLRB No. 141:

> Surely a union is vested with sufficient lawful means of persuasion and peer pressure to preserve strike solidarity without requiring suspension of the Act's fundamental protections. In fact, if a union is unable to preserve strike solidarity through less restrictive means than sanctions that override the Act's protections, perhaps it should reconsider its decision to strike in the first place.
> (Concurrence by Members Van de Water and Hunter, *id.*, at slip opn., p. 24, fn. 42.)

A body no less than the California State Supreme Court

has recently stated in an agency shop case that, "Requiring dismissal of an employee is too drastic a measure for this court to endorse." (*San Lorenzo Education Association* v. *Wilson* (Dec. 6, 1982) ____ Cal.3d ____.) Clearly, where effective but less restrictive means can be employed by the union to promote strike solidarity, it is an improper exercise of this Board's discretion to permit the union to nullify employees' Labor Code section 1152 rights by using the harshest possible means of enforcing strike solidarity.[4]

Dated: December 30, 1982

JOHN P. McCARTHY, Member

[4] Although I find that some discipline for acts in derogation of a strike may be justifiable, any proceeding against a member on account of such acts is invalid so long as the penalty could include expulsion and consequent loss of employment under a good standing provision. Since that is the case with respect to all the Charging Parties herein, I agree with the majority only insofar as they have ordered the Union to reinstate as members, make whole, and obtain reemployment for the Charging Parties.

APPENDIX C

Order of the California Court of Appeal Denying the Petition for Rehearing

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION TWO

MARIA G. NAVARRO, *et al.* *Petitioners,* *v.* AGRICULTURAL LABOR RELATIONS BOARD, *Respondent.*	A021200 A021202 A021137 A021199 A022544 8 ALRB No. 103 8 ALRB No. 104

BY THE COURT:

The petitions for rehearing are denied.

Dated: June 20, 1984

/s/ KLINE, P.J.
Presiding Judge

APPENDIX D

Notice from the Supreme Court of California Denying Hearing

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

8 AUGUST 1984

I have this day filed Order:
Hearing Denied

In re: 1 Civ No. A021137

SEVERO PASILLAS

vs

ALRB, UFW AFL-CIO

Respectfully,

Clerk

APPENDIX E

Notice of Appeal

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION TWO

SEVERO PASILLAS,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD

Respondent,

A021137
(8 ALRB No. 103)

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO and SUN HARVEST, INC.,

Real Parties in Interest.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that the Petitioner Severo Pasillas hereby appeals to the Supreme Court of the United States from that part of the court's final judgment of May 24, 1984 which enforced the Order of the Agricultural Labor Relations Board and denied claims that the union-security provision of California Labor Code § 1153(c) deprived him of rights guaranteed by the Constitution of the United States.

This court denied rehearing on June 20, 1984 and the Supreme Court of California denied hearing on August 8, 1984.

The appeal is taken under the provision of 28 U.S.C. § 1257(2).

Dated: November 1, 1984

Respectfully submitted,

A. Roger Jeanson, Esquire
HAAS & NAJARIAN
530 Jackson Street, Suite 303
San Francisco, California 94123
Telephone: (415) 788-6330

Robert F. Gore, Esquire
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
Telephone: (703) 321-8510

Attorneys for Appellant

APPENDIX F

[Extract from Pasillas Unfair Labor Practice Charge 80-CC-11-SAL against the United Farm Workers of America, AFL-CIO dated April 28, 1980]

AGRICULTURAL LABOR RELATIONS BOARD
UNFAIR LABOR PRACTICE CHARGE
80-CC-11-SAL
APRIL 28, 1980

* * * *

Within the last six months, the United Farm Workers of America, has violated California Labor Code Section 1154(b) by enforcing a union security provision in a collective bargaining agreement requiring "full membership in good standing" as a condition of continued employment. Full membership in good standing is not a "reasonable" condition of employment under Section 1153(c) and violates my constitutional rights under both the California and United States constitutions.

/s/
SEVERO PASILLAS

APPENDIX G

[Extracts from Pasillas Unfair Labor Practice Charge 80-CE-30-SAL against Sun Harvest, Inc. dated April 28, 1980]

AGRICULTURAL LABOR RELATIONS BOARD
UNFAIR LABOR PRACTICE CHARGE
80-CE-30-SAL
APRIL 28, 1980

* * * *

Within the last six months, the Sun-Harvest, Inc. and agricultural workers, have violated California Labor Code Section 1154(b) by enforcing a union security provision in a collective bargaining agreement requiring "full membership in good standing" as a condition of continued employment. Full membership in good standing is not a "reasonable" condition of employment under Section 1153(c) and violates my constitutional rights under both the California and United States constitutions.

/s/
SEVERO PASILLAS

Office - Supreme Court, U.S.
FILED
DEC 10 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-739

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

SEVERO PASILLAS,

Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
and
UNITED FARM WORKERS OF AMERICA, AFL-CIO

Appellees.

On Appeal from the California Court of Appeal,
First Appellate District, Division Two

APPELLEE'S MOTION TO DISMISS

DIANNA LYONS
Counsel of Record
Dianna Lyons
Daniel A. Garcia
Wendy Sones
1301 24th Street
Sacramento, CA., 95816
(916) 442-1362

Attorneys for Appellees
UNITED FARM WORKERS
OF AMERICA, AFL-CIO

7 December 1984

BEST AVAILABLE COPY

QUESTION PRESENTED

Does the California Legislature's failure, when it enacted the State's Agricultural Labor Relations Act, to prohibit private union shop, union security agreements which were permitted under the State's pre-Act common-law, constitute "state action" sufficient to invoke the Fourteenth Amendment?

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No. 84-739

IN THE

SUPREME COURT OF THE UNITED STATES

SEVERO PASILLAS,

Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD, and UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Appellees.

On Appeal from the California Court of Appeal, First Appellate District, Division Two

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APPELLEE'S MOTION TO DISMISS

Appellee United Farm Workers of America, AFL-CIO (UFW or Union)[1/], pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal

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1. Appellant failed to name the UFW as a party in spite of Rule 10.4 which requires including the Union, Real Party in Interest before the California Court of Appeal, as an appellee.

on the following grounds:

1. The appeal does not present a substantial federal question.

2. The Decision and Order of the California Court of Appeal correctly decided all issues properly before the Court.

COUNTER-STATEMENT OF THE CASE

California, like most of the States, took no action to afford its agricultural workers collective bargaining rights when Congress' 1935 enactment of the National Labor Relations Act (NLRA), 49 Stat. 477, excluded such workers from its protections. (29 U.S.C.§2(3).) Thus, for forty years following the federal enactment that assured industrial workers the rights to organize and elect exclusive union representatives and compelled employers to engage in good faith collective bargaining with unions selected by a worker majority (29 U.S.C.§§157-159), California farm workers were left to their own meager devices.

The workers are primarily migrants and their employment, seasonal. A "significant number read and understand only Spanish, Filipino, or other languages from India or the Middle East".[2] Wages have been uniquely low and fringe benefits, practically nonexistent.[3] Organizing efforts were historically met with crippling injunctions that effectively destroyed any possibility of winning union contracts or other concessions.[4]

Moreover, under California's laissez-faire policy, when farm workers came under union contract, employers were free to choose the union without regard for the workers' preference.[5]

The State's common-law imposed no restrictions upon union security agreements that private parties negotiated. Open shops--where

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2. Agricultural Labor Relations Bd. v. Superior Court 16 Cal.3d 392 (1976).

3. Legal Problems of Agricultural Labor, II Univ.Cal. L.Rev. (1970) at 39-46 and 113-171.

4. Shatz, "Picketing Injunctions in California: A Story of Farm Labor Disputes", 28 Hastings L.J. 801 (1977).

5. Englund v. Chavez, 8 Cal.3d 572 (1972).

union membership may not be compelled, union shops--where membership is required within a time certain of obtaining employment, and closed shops[6]--where union membership is a prerequisite to obtaining employment[7], were equally acceptable[8]. Indeed, workers could be compelled to join the union that contracted with their employer even if it represented none of the bargaining unit workers; and employers were under no legal compulsion to bargain with a union even if it represented one-hundred percent of the workers.[9]

Workers' struggle to unionize under such circumstances produced strikes, boycotts, and public clamor for legislation to protect farm

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6. California's common law, however, has long prohibited unions from arbitrary and invidious discrimination as to who is admitted to membership. James v. Marinship Corp., 25 Cal.3d 721, 740-741.

7. Grodin & Beeson, "State Right to Work Laws and Federal Labor Policy" 52 Cal.L.Rev. 95, 97 (1964).

8. Englund v. Chavez, supra., at 8 Cal.3d 596.

9. Ibid.

workers from employer abuses.[10/]

The California Legislature responded in 1975 by enacting the Agricultural Labor Relations Act (ALRA or Act)[11/] which expressly recognized the "economic dislocation and social injustice" under which farm workers labored, and the "presently unstable and potentially volatile condition in the state".[12/]

The Act follows the federal model in many respects, but deviates from the NLRA in many particulars in response to the exigencies of California agriculture as well as the historical problems the Legislature addressed. Elections, for example, must be conducted within seven days of the workers' petition seeking to voice their representative choice, and within forty-eight hours if a strike is in progress.

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10. Hyink, Issues and California Politics and Government, Crowell Co., New York (1977) at 8.

11. California Labor Code §1140 et. seq.. Hereinafter all statutory references are to the California Labor Code unless otherwise indicated.

12. Stats. 1975, Third Ex.Sess.,ch1,§1, No. 3 West's Cal. Legis. Service, p.304,no.2, Deering's Adv. Legis. Service, p. 1147.

13. Section 1156.3(a).

Elections are conducted by the Agricultural Labor Relations Board (ALRB or Board) upon a petition filed at a seasonal peak in employment by a majority of the workforce (§1156.3-1156.4). Those deviations from the federal model respond to California agricultural's migrant and seasonal employment patterns without sacrificing the State's policy to maximize seasonal workers' enjoyment of statutory rights (§1156.4) and, generally, to "encourage and protect" farm workers' exercise of rights to unionize (§1140.2).

The Legislature also elected to deviate from the federal model regarding union security agreements. The framers expressly rejected an amendment to adopt NLRA §8(a)(3) language which exempts employers' compliance with union security contracts which condition continued employment upon payment of periodic dues and assessments from the NLRA's unfair labor practice prohibition against employer discrimination to encourage or discourage union activity. (29 U.S.C.§158(a)(3).) Instead, the Legislature

drafted §1152--which describes employees' rights, §1153(c)--which proscribes employer discrimination on the basis of union activity, and §1154(b)--which proscribes such discrimination by unions, so that pre-Act State law was not disturbed. Section 1152 affirmatively provides farm workers self-organization, collective bargaining, and concerted activity "for mutual aid or protection" rights, and affords a less expansive "right to refrain" from such activities. Rather than a parallel right to refrain from statutorily protected employee activities, the Legislature granted a right to refrain

> "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153".

Similarly, in §1153(c), the Legislature expressly exempted union security agreements that were permissible under pre-Act law from nullification by the ALRA when it excepted employer compliance with such union security agreements from that subdivision's prohibition

against discrimination to encourage or discourage union membership.

> "Nothing in this part, or in any other statute of this state, shall preclude an agricultural employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this section as an unfair labor practice) to require as a condition of employment, membership therein . . . if such labor organization is the representative of the agricultural employees . . . . (M)embership shall mean the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing; provided, that such membership shall not be denied or terminated except in compliance with a constitution or bylaws which afford full and fair rights to speech, assembly, and equal voting and membership priviliges for all members, and which contain adequate procedures to assure due process to members and applicants for membership."

(§1153(c); emphasis added.)

Section 1154(b), the subdivision prohibiting union discrimination, includes a parallel exception reflecting the Legislature's decision to abstain from modifying pre-Act State law regarding union security agreements:

> "It shall be an unfair labor practice for a labor organization . . . to cause or attempt to cause an agricultural employer to discriminate against an employee in violation of subdivision (c) of Section 1153, or to discriminate against an employee with respect to whom membership

> in such organization has been denied or terminated for reasons other than failure to satisfy the membership requirements specified in subdivision (c) of Section 1153."

Thus, while the Act assures workers' unfettered right to form, join and assist unions and outlawed discriminatory reprisals, it did not assure an equally broad right to refrain from engaging in union activity. Instead, the Legislature carefully exempted prior law--which permitted the full range of union security agreements--from the Act's reach.[14/]

In addition, however, the Legislature codified pre-Act common-law barring arbitrary invidious discrimination, and statutorily assured members and applicants both substantive and procedural due process and equal protection It required that membership be conditioned only upon "reasonable terms and conditions uniformly

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14. Appellant's characterization of §1152 as granting rights and thereafter withdrawing them and his parallel claim that such a withdrawal constitutes state action for Fourteenth Amendment purposes misconstrues the legislative process. Rather than conferring a quantum of rights and subsequently withdrawing a portion thereof, the Legislature limited, at the outset, the body of rights conferred.

applicable to other members in good standing", and that membership be neither terminated nor denied except in compliance with "full and fair rights to speech, assembly, and equal voting and membership priviliges" as well as with procedural due process requirements.[15] (§1153(c).)

Appellant's employer and the UFW agreed to a union shop union security agreement in each of their successive collective bargaining agreements. Upon the termination of one such Agreement, and prior to reaching a succeeding Agreement, the UFW engaged in a strike. Appellant crossed the Union's picket lines and broke the strike in contravention of the UFW's rule prohibiting its members from breaking its strikes. A Union member filed charges against Appellant within the UFW Constitution's six

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15. Such speech, association, and due process protections as well as the State's prohibition against arbitrary and invidious discrimination in union membership, have their origins in California's common-law which mirrors certain federal protections. See, e.g. DeMille v. American Fed. of Radio Artists, 31 Cal.2d 139 (1947); Cason v. Glass Bottle Blowers Assn., 37 Cal.2d 134 (1951); and Holderby v. Operating Engineers, 45 Cal.2d 843 (1955).

month limitation and Appellant was served with the charge and notified of his trial date. He neither appeared for his trial on those charges of continuous strike breaking, however, nor pursued internal Union appeal procedures to which he was notified that he was eligible. The UFW-member trial body found Appellant guilty of strike breaking and ordered his expulsion. The UFW notified Appellant's employer, who was by then a signatory to a renewed collective bargaining Agreement with the UFW including a union security clause requiring membership in good standing, of Appellant's expulsion; and the employer voluntarily complied with the Agreement by discharging Appellant.

Appellant pursued none of his internal union remedies and established no justification for failing to avail himself of those Union procedures. Rather, he filed an unfair labor practice charge with the Board which was ultimately dismissed on the basis of Appellant's failure to exhaust internal Union remedies.

Appellant's §1160.8 petition for judicial

review resulted in the California Court of Appeal, First Appellate District, Division Two opinion from which Appellant now appeals.

Appellee UFW respectfully submits that the appeal should be dismissed forthwith not only because of Appellant's fatal failure to exhaust internal Union remedies (Clayton v. Automobile Workers, 451 U.S. 699 (1981); and Holderby, supra.), but also because Appellant's challenge to the constitutionality of §1153(c) must fail for want of the prerequisite state action invading pre-existing private rights.

ARGUMENT

THE CALIFORNIA LEGISLATURE'S FAILURE TO PROHIBIT UNION SECURITY AGREEMENTS THAT PRE-ACT STATE LAW PERMITTED CONSTITUTES "STATE INACTION", RATHER THAN THE SORT OF "STATE ACTION" REQUIRED TO TRIGGER CONSTITUTIONAL SCRUTINY.

Appellant purports to rely upon this Court's Shelley v. Kraemer, 334 U.S. 1 (1948) opinion as support for his claim that state

action as contemplated by the Fourteenth Amendment is present here. The Shelley opinion, however, defeats that claim. There, the Court addressed restrictive covenants compelling arbitrary and invidious racial discrimination in housing. The lower court's judgment enforced the covenant and, thereby, the discrimination. This Court said:

> "the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are affectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated...." (344 U.S. 1,13; emphasis added.)

It was the judicial enforcement of the restrictive covenants that followed the private individuals' refusal to voluntarily comply that constituted state action in Shelley. The Court made it quite clear that state inaction would not trigger constitutional scrutiny when the Court said:

> "These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discrimination as they see fit. Rather, these are cases in which the States

> have made available to such individuals the full coercive power of government to deny to petitioners, on the basis of race or color, the enjoyment of property rights . . . . The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." (344 U.S. 1,19; emphasis added.)

See also, Barrows v. Jackson 346 U.S. 249 (1953) regarding California's refusal to enforce such covenants in an action for damages. This Court approved the California Supreme Court's conclusion that such judicial enforcement would contravene the Fourteenth Amendment but noted that "voluntary adherence would constitute individual action only". 346 U.S. at 253.

Similarly, in Mulkey v. Reitman, 64 Cal. 2d 529 (1966) the California Supreme Court opined that

> "However subtle may be the state conduct which is deemed 'significant', it must nevertheless constitute action rather than inaction. The ... Fourteenth Amendment is prohibitory in nature (and does not) impose upon the state an obligation to take positive action in an area where it is not otherwise committed to act. (64 Cal.2d 537-538.)

And, in a related case, this Court affirmed the California Supreme Court's conclusion that the "State was permitted a neutral position with respect to private racial discriminations and that the State was not bound by the Federal Constitution to forbid them". Reitman v. Mulkey, 387 U.S. 369 (1967), at 387 U.S. 374.

The union security Agreement at issue here was manifestly not enforced by the State. Neither the Board nor the reviewing Court engaged in any conduct even remotely resembling enforcement. Rather, the parties to the Agreement voluntarily complied with its terms. Nor is the ALRB empowered to enforce union security agreements. It is statutorily authorized to act only when an unfair labor practice charge is filed and then only to determine whether an unfair labor practice has been committed (§1160.3.) insofar as its functions relate to the case at bench. The only unfair labor practice prohibitions related to union security matters are §§1153(c) and 1154(b). Thus, in the union security realm, the Board could only

find one of two things: (1) that no unfair labor practice was committed, or (2) that an unfair labor practice was committed by an employer, a union, or both. The former would certainly not constitute enforcement of a union security agreement; and in the latter circumstance, the Board is only empowered to restrain the Agreement's enforcement (§1160.3).

Nor could the Union file an unfair labor practice charge and thereby engender Board enforcement of its Agreement with an employer who refused to voluntarily comply with contract terms such as a union security provision. Contract violations in and of themselves do not constitute unfair labor practices. Textile Workers Union v. Lincoln Mills 353 U.S. 448, 452 (1957); Mine Workers v. N.L.R.B., 257 F.2d 211, 214-215.

Nor, of course, does the present case present a justiciable controversy[16/] surrounding enforcement of a union security provision. Here,

16. Thus, addressing a state enforcement question would be in the nature of an advisory opinion and therefore impermissible. Flast v. Cohen, 392 U.S. 83,

the parties voluntarily complied with the union security agreement's terms.

The Railway Employees' Department v. Hanson, 351 U.S. 225 (1955) line of cases, similarly, provides no basis for concluding that state action is present here. In Hanson the Railway Labor Act (RLA) §2 Eleventh expressly superseded contrary state law. The case arose out of Nebraska. The State Constitution prohibited union shop union security agreements, but was superseded by the RLA provision permitting such union security devices. This Court said:

> "The Supreme Court of Nebraska said, 'Such action on the part of Congress is a necessary part of every union shop contract entered into on the railroads so far as those 17 (right to work) states are concerned for without it such contracts could not be enforced therein.' (Citations) We agree with that view. If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded." (351 U.S. 232.)

The California Legislature's enactment of §1153(c) had no similar impact. Prior to the enactment, unions were free to enter into

any type of union security agreement that they could persuade an employer to sign, and they were not even faced with a prerequisite of showing majority employee support. Englund v. Chavez, supra., at 8 Cal.3d 597. The private right to avoid compulsory unionism that Nebraska's citizens "enjoyed" prior to "congressional invasion" through RLA §2 Eleventh did not exist in California before 1975 (Colgate Palmolive Co. v. NLRB (1950) 338 U.S. 355) and does not exist here now. The fact that union shop agreements were permitted prior to §1153(c)'s enactment and are still permitted under its terms does not constitute governmental invasion of private rights.

Indeed, in Wicks v. Southern Pacific Co. 121 F.Supp. 454 (1953), aff'd, 231 F.2d 130 (9th Cir. 1956), and in Otten v. Baltimore 205 F.2d 58, a similar situation arose when union security provisions were challenged. The agreements also involved RLA §2 Eleventh, but arose in California and New York, respectively. Neither States' law prohibited union shops.

In both instances, the Courts found that there was no congressional invasion of private rights. The RLA altered nothing in either situation. Justice Learned Hand, writing for the Otten Court, and quoted in Wicks, said:

> "We cannot understand how the subsection can be regarded as conferring validity on the agreement; since all it does is exempt it from nullification by other statutes or laws". (Wicks, supra., quot- from Otten, at 231 F.2d ___, 37 LRRM 2725,2729.)

That is precisely what §§1153(c) and 1154(b) do, here. Absent the provisos in those sub-sections, the Legislature's 1975 enactment of §1152-1154 would have substantially altered prior California law with respect to union security. Including those provisos, however, resulted in State law remaining unchanged with respect to the form(s) of union security that private parties may permissibly negotiate. The California Legislature abstained from such modification of State law, and opted instead to retain its pre-Act neutrality described in Englund v. Chavez, supra., as well as in Gabaldon v. United Farm Workers Organizing Com-

mittee, 35 Cal.App.2d 757 (1973) and Mendoza v. United Farm Workers Organizing Committee 487 F.2d 311 (9th Cir. 1973), cert. denied 415 U.S. 918.

A number of federal courts have reached a similar conclusion in litigation involving the NLRA which, unlike RLA §2 Eleventh, expressly does not supersede state right to work laws with its 29 U.S.C.§158(a)(3) union security proviso permitting a limited form of union shop (29 U.S.C.§164(b).) In Kolinske v. Lubbers, 712 F.2d 471 (D.C.Cir. 1983), the Court concluded that the NLRA's union security proviso is neutral in its impact upon pre-existing private rights to avoid compulsory unionism. (712 F.2d ___, 113 LRRM 2957,2962.) Similarly, in Reid v. McDonnel Douglas Corp., 443 F.2d 408 (10 Cir. 1971) the Court concluded that the NLRA, unlike the RLA, did not "insinuate itself into the decision of a union and an employer to agree to a union security clause so as to make that choice governmental action for purposes of the First and Fifth Amendment".

(443 F.2d 410-411, 77 LRRM 2609,2611.)

The First Circuit reached a similar conclusion in Hovan v. Carpenters, 703 F.2d 571 (1st Cir. 1983) and questioned whether state action has been too "liberally" found in labor cases. The Hovan Court also questioned whether constitutionalizing "union actions may bring about extensive change in our economic and political systems and not necessarily for the better".

In any event, the California Legislature's decision to refrain from altering prior State law's neutrality toward union security provisions certainly presents no governmental invasion of private rights. Rather, it constitutes the epitomy of state inaction.

Accordingly, the instant appeal should be dismissed for want of a substantial federal question.

CONCLUSION

California's response to the economic dislocation and social injustice suffered by

its farm worker citizens and residents sought to alleviate historically entrenched injustice that left individual workers powerless to deal efficaciously with their far more powerful employers. Toward that end the State borrowed from the federal model but also added unique provisions expressly designed to address the exigencies of California agriculture's migrant and seasonal employment patterns as well as the nascent developmental stage of the State's agricultural unions. With respect to union security, the Legislature chose to leave its prior neutrality unaltered, much as Congress addressed the issue in its 1935 enactment of the original NLRA, rather than adopting the more restrictive Taft-Hartley Amendment (61 Stat. 136 (1947), §8(a)(3).) that is presently 29 U.S.C.§158(a)(3). That policy choice was surely the State's to make, and just as surely constitutes state inaction rather than the sort of governmental invasion of pre-existing private rights that triggers application of the Fourteenth Amendment.

On that basis alone, the instant appeal should be dismissed.

In addition, however, the appeal warrants dismissal because Appellant failed to approach, much less exhaust, available internal union remedies.

Each of the foregoing issues, and others, was correctly stated and decided by the California Court of Appeal, First Appellate District, Division Two. The State Court's scholarly opinion reflects a thorough analysis of the Legislature's intent as well as of the historical context that preceded the ALRA's enactment. The Court of Appeal's opinion should therefore be affirmed and the appeal dismissed.

Appellee UFW therefore respectfully urges this honorable Court to dismiss the

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instant appeal for want of a substantial federal question and, thereby, to affirm the Court of Appeal's opinion.

Dated 7 December 1984

Respectfully submitted,

DIANNA LYONS
Counsel of Record
1201 24th Street
Sacramento, CA 95816
(916) 442-1862

Attorney for Appellee
UNITED FARM WORKERS
OF AMERICA, AFL-CIO

Office - Supreme Court, U.S.
FILED
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CLERK

(3)

NO. 84-739

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

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and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Appellees.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

MOTION OF APPELLEE AGRICULTURAL LABOR RELATIONS BOARD TO AFFIRM

DANIEL G. STONE
Solicitor of the Board
NANCY C. SMITH
Deputy Solicitor
CATHY A. CHRISTIAN
Deputy Solicitor
AGRICULTURAL LABOR RELATIONS BOARD
915 Capitol Mall, Third Floor
Sacramento, CA 95814
Telephone: (916) 322-7021

Counsel of Record for Appellee
Agricultural Labor Relations Board

#1450

3114

NO. 84-739

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

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DANIEL G. STONE
Solicitor of the Board
NANCY C. SMITH
Deputy Solicitor
CATHY A. CHRISTIAN
Deputy Solicitor
AGRICULTURAL LABOR RELATIONS BOARD
915 Capitol Mall, Third Floor
Sacramento, CA 95814
Telephone: (916) 322-7021

Counsel of Record for Appellee
Agricultural Labor Relations Board

#1450

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QUESTION PRESENTED

1. Is mere enactment of a state agricultural labor relations statute, which -- much as the original National Labor Relations Act -- permits labor organizations and employers to negotiate union shop agreements, sufficient governmental action to invoke constitutional scrutiny?

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EDITOR'S NOTE

PAGES V thru 24 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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STATEMENT OF THE CASE

Appellant Severo Pasillas was an agricultural employee of Sun Harvest, Inc., a California grower under the jurisdiction of the Agricultural Labor Relations Act (ALRA or Act).[1/] In January of 1979, Pasillas' union United Farm Workers of America, AFL-CIO (UFW), called a strike against his employer. In June of 1979, despite offers of help from the union, he returned to work at Sun Harvest, Inc. during the strike, claiming economic necessity. In September of 1979, the UFW and Sun Harvest, Inc. reached agreement on a new collective bargaining contract which, like the previous contract, included a union security clause requiring membership in the union as a condition of employment. Such an agreement, termed a "union shop" and long permitted under California common law, is also

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1. The ALRA is found at California Labor Code section 1140, et seq.

permitted by California Labor Code section 1153(c).

UFW members, Pasillas' co-workers, brought charges against him for his strike breaking activities. Internal union disciplinary proceedings were commenced, but, even though he was notified, Pasillas chose not to attend. Nor did Pasillas thereafter avail himself of the internal union appellate procedures. The union trial committee's vote to expel him from the union was therefore unchallenged. Pasillas later filed charges with the Agricultural Labor Relations Board (ALRB or Board), but the Board dismissed the complaint for failure to exhaust internal union remedies. (Jurisdicitional Statement (J.S.), App. B, 46a-78a.)

Pasillas then sought review in the state Court of Appeal, pursuing his constitutional challenge to California Labor Code 1153(c). Upon review of the Board decision,

and of the various arguments raised by Pasillas in his constitutional attack on the statute, the Court of Appeal held that no governmental action was involved in the parties' inclusion of the union security provision in the UFW/Sun Harvest collective bargaining agreement. The Court of Appeal therefore rejected Pasillas' constitutional claims. (J.S., App. A, 15a-31a.)

ARGUMENT

Appellant Pasillas first argues that the state court was incorrect in finding that the mere enactment of the ALRA was insufficient governmental action to invoke constitutional scrutiny of privately negotiated union security agreements. Pasillas contends that merely because the statute exists, and provides for certain organizational rights and protections, the state is involved in every private collective bargaining agreement containing a union security clause. As more fully discussed

infra, what appellant overlooks is that, in order to find state action in the operation of a labor relations statute, this Court and several federal circuit courts have required that the statute itself be the source of the right to negotiate a union security agreement. For example, in the lead case of Railway Employees Dept. v. Hanson (1956) 321 U.S. 225, it was not enough that Congress enacted the Railway Labor Act (RLA), and that the statute permitted railways and unions to negotiate union security agreements. It was the fact that the RLA expressly overrode any contrary state law that convinced this Court that the RLA itself was governmental action; that was so because the statute was the sole source of the right to negotiate union security agreements. This was also the reasoning employed by the California Court of Appeal in analyzing the ALRA.

Appellant also argues that,

assuming state action, California Labor Code section 1153(c) violates his constitutional rights of association and equal protection. Appellee ALRB will not discuss this second issue in this preliminary motion, because the California Court of Appeal rested its opinion on a finding of no state action. Appellee will demonstrate, however, that the California Court of Appeal correctly analyzed the state action issue and that there is therefore no need for this Court to assume jurisdiction. The ALRB therefore urges this Court to summarily affirm the opinion of the California Court of Appeal in Pasillas, et at. v. Agricultural Labor Relations Board (1984) 156 Cal.App.3d 350. (J.S., App. A.)

I

THE COURT OF APPEAL CORRECTLY DETERMINED THAT NO STATE ACTION IS PRESENT IN THE EXISTENCE OF UNION SECURITY CLAUSES NEGOTIATED UNDER THE CALIFORNIA AGRICULTURAL LABOR RELATIONS ACT.

The Court of Appeal correctly

determined that California Labor Code section 1153(c) does not involve the government in the decision of a labor organization and an employer to negotiate union security agreements. In his argument to the state court, urging that state action be found, Pasillas argued only that (1) the Board, in an earlier administrative decision, had conceded state action; and (2) this Court's decision in Railway Employees Dept. v. Hanson (1956) 351 U.S. 225, and the First Circuit's decision in Linscott v. Miller Falls Co. (1st Cir. 1971) 440 F.2d 14 and a related line of cases require a finding of state action in the operation of the ALRA.

The California Court of Appeal succinctly and correctly rejected these arguments. The first of course does not present any possible federal question, and will not be discussed herein. The second argument ignores the fact that -- contrary

to the Railway Labor Act (RLA), the statute which was under consideration in the Hanson decision -- California Labor Code section 1153(c) is a "passive" statute, mandating nothing whatsoever. In this sense, the ALRA is identical to the National Labor Relations Act (NLRA).

On its face, the ALRA is couched in exclusionary language. That is to say, section 1153(c) does no more than state that, if an employer and a union agree to the inclusion of a union shop clause in their collective bargaining agreement, the law will not treat such a clause as an unfair labor practice. Such clauses, if agreed to, are exempted from the class of conduct which the ALRA elsewhere defines to be unfair labor practices.

But the significance of the exclusionary cast of the statute is not only in the fact that the statute does not compel anything. For if, prior to the enactment of

section 1153(c), the law in California prohibited union shop agreements, then section 1153(c) would represent an important change in law, authorizing such agreements where they had once been precluded.

However, the plain fact is that section 1153(c) did not change California law, and this is the deeper significance of the statute's passive character. Section 1153(c) merely declares that the law in California in existence prior to the enactment of the ALRA will remain unchanged by that Act. The statute, therefore, does not authorize union shop agreements so much as it clarifies that the pre-existing right of an employer and a union to enter into a union shop agreement is not altered by the statutory provision defining and prohibiting unfair labor practices, so long as the union involved is the duly certified representative of the employees.

For nearly 80 years, California has

permitted the union shop -- indeed, it has permitted even the "closed" shop. The ALRA merely continued in existence this long-standing state policy. And it is precisely because section 1153(c) did not change the law in this respect, and does not create new rights or obligations, that Pasillas' constitutional claims must fail. To invalidate section 1153(c) would effectively result in judicial legislation, prohibiting that which the California Legislature and the California courts have deliberately and consistently permitted: the union shop.

The ability of a union and employer to enter into a collective bargaining agreement providing for a union shop -- or even a closed shop -- has roots deep in California law. (See, e.g., J.F. Parkinson Co. v. Building Trades Council (1908) 154 Cal. 581, 598-600; Shafer v. Registered Pharmacists Union (1940) 16 Cal.2d 379, 387 ["The courts of this state have recognized the validity

of closed union shop agreements for more than thirty years"]; Gabaldon v. United Farm Workers Organizing Committee (1974) 35 Cal.App.3d 757, 766-768; Colgate-Palmolive-Peet Co. v. N.L.R.B. (1949) 338 U.S. 355, 361-362.)

The California Supreme Court has even affirmed a superior court's issuance of a preliminary injunction restraining breach of a collective bargaining agreement's union security clause. (Silva v. Mercier (1949) 33 Cal.2d 704 [complaint charged employer with improperly retaining workers who had failed to join the union.].)

In 1959, sixteen years before passage of the ALRA, the California Supreme Court expressly found that California law did not preclude union security agreements, so long as they were negotiated by a duly authorized collective bargaining representative of the employees. (Chavez v. Sargent (1959) 52 Cal.2d 162.)

In Petri Cleaners, Inc. v. Automotive Employees, Etc. (1960) 53 Cal.2d 455, the state Supreme Court reversed the Chavez limitation on union security clauses. In Petri, the state Supreme Court stated:

> We conclude that employers are not required by law to engage in collective bargaining and the closed or union shop agreements and concerted activities to achieve them are lawful in this state whether or not a majority of the employees directly involved wish such agreements. . . If a contrary rule is to be established, the Legislature, not this court, must enact it.

(53 Cal.2d at 474, 475; emphasis added; see also Messner v. Journeymen Barbers, Etc. International Union (1960) 53 Cal.2d 873; Englund v. Chavez (1972) 8 Cal.3d 572.)

It was against this background that the California Legislature in 1975 enacted the ALRA. Modeled after the National Labor Relations Act (NLRA), the ALRA creates a five-member quasi-judicial administrative tribunal to administer the Act's provisions. (Cal. Lab. Code, sec. 1141.) The ALRA

expressly vests agricultural employees with organizational rights.

The ALRA also defines certain forms of conduct as "unfair labor practices." Although the Act states that it will be an unfair labor practice for an agricultural employer, by any term or condition of employment, "to encourage or discourage membership in any labor organization", an exception was provided for union security agreements. (Cal. Lab. Code sec. 1153(c).)

By enacting Labor Code section 1153(c), the Legislature therefore merely codified existing state law governing the enforceability of union shop agreements. In essence, the ALRA did nothing more than limit the scope of California's previous "laissez faire" approach to the issue by restricting such negotiations to elected representative unions. Far from creating a union right to negotiate a union shop agreement, the Act limited the pre-existing

right, so as to ensure that the bargaining union has majority support among the affected employees.

Quite apart from the fact that California's long history of permitting union shop agreements was not materially altered by Labor Code section 1153(c), there is the fact that the statute is, in any event, permissive and not mandatory. This is the critical fact that appellant ignores, and it is the basis for the California Court of Appeal's determination that no state action exists in the operation of the ALRA.

The California situation stands in sharp distinction to that described in Railway Employees' Department v. Hanson, supra, 351 U.S. 225. There, the Supreme Court preliminarily noted that the union shop provision of the federal RLA was only permissive: " Congress has not compelled nor required carriers and employees to enter into union shop agreements." (351 U.S. at

231.) However, contrary to the law in California, the State of Nebraska had adopted a constitutional amendment prohibiting union shop agreements, whereas the RLA contained a provision permitting union security agreements notwithstanding the law of any state. The Hanson court concluded that, by virtue of the Supremacy Clause of Article VI of the United States Constitution, federal law superseded state law and made union security clauses permissible where they had been otherwise prohibited. This conflict was the source of governmental action which brought a constitutional dimension to the employees' objection to the contract: "If private rights are being invaded, it is by force of an agreement made pursuant to a federal law which expressly declares that state law is superseded. [Citations.] The enactment of the federal statue authorizing union shop agreements is the governmental action on

which the Constitution operates, though it takes a private agreement to invoke the federal section." (351 U.S. at 232; emphasis added.)

The same reasoning was used by the Supreme court in International Association of Machinists v. Street (1961) 367 U.S. 740, which involved a conflict between the Railway Labor Act and a Georgia "right-to-work" statute (see Machinists Association v. Street (GA 1959) 108 S.E.2d 796), and in Brotherhood of Railway and Steamship Clerks v. Allen (1963) 373 U.S. 113, each involving a conflict between the permissive federal provision and the prohibitive state law. It was precisely that conflict that provided the requisite governmental action necessitating the consideration of constitutional issues. But the same result does not necessarily obtain where no such conflict exists.

The most recent Ninth Circuit

holding on the issue is apparently Wicks v. Southern Pacific Co. (9th Cir. 1956) 231 F.2d 130, cert. den. 351 U.S. 946.[2/] There, the circuit court ruled that a statute which merely permits a union shop agreement does not supply the requisite state action to invoke constitutional restraints. Moreover, addressing California's particular situation, the court gave this analysis:

> It was pointed out in [Otten v. Baltimore & O. R. Co. (2nd Cir. 1953) 205 F.2d 58], that there "might" be a substantial constitutional issue if state law prohibited the union shop while the amendment of Congress permitted the union shop. But the Second Circuit found no substantial constitutional issue on this ground as New York law did not prohibit the union shop. Here again, these cases before us fall within the facts of the Otten case. California, like New York, permits union security agreements, including a form even more liberal than the so-called union shop, namely the "closed shop."

(231 F.2d at 136-137; emphasis in orginial.)

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2. Significantly, this Court denied certiorari in the Wicks case one week after its issuance of Railway Employees' Dept. v. Hanson, supra, 351 U.S. 225.

(C.f., Adams v. Southern Calif. First Nat. Bank (9th Cir. 1974) 492 F.2d 324, 328-329.)

This Court's recent decisions would seem to be consistent with the Ninth Circuit's Wicks reasoning. In Abood v. Detroit Board of Education (1977) 431 U.S. 209, this Court expressly declined to extend constitutional restraints to private collective bargaining agreements absent some additional showing of state action.

In Abood, appellant employees sought to distinguish the ruling in Railway Employees' Dept. v. Hanson, supra, 351 U.S. 225, which permitted dues collections form non-members, on the ground that, unlike the employer in Hanson, their employer was a public entity and should therefore be held to stricter constitutional standards. It will be remembered that, in Hanson, this Court found that union security clauses under the RLA did not violate the First or Fifth Amendments of the United States

Constitution; the appellants in Abood argued that a different result should obtain where the employer is the government. (431 U.S. at 226.)

This Court rejected appellants' efforts; state action, it ruled, is state action, whether that action results from the fact that the actor is the government itself, or from the fact that the actor acts pursuant to legislation. The Court noted that, in Hanson, the requisite governmental action was found in the fact that the union security provisions at issue would have been unenforceable but for the RLA's language expressly superseding conflicting state law. Having found state action, the Hanson Court nevertheless found no constitutional deprivation. No "greater" state action was provided by the facts in Abood, the Court held. (431 U.S. at 226.)

The majority's conclusion -- that its reliance on the Hanson constitutional

analysis of the union security clause did not depend upon the existence of a governmental employer -- drew sharp criticism from the dissent. The dissent read the majority's reasoning as holding "that the same constitutional constraints invariably apply when the government fosters or encourages a result in the private sector by permissive legislation as when it commands that result by the full force of law." (431 U.S. at 251, n. 5, conc. opn. of Powell, J.) Unlike the RLA, the Michigan statute at issue in Abood did not create the right to negotiate an agency shop agreement where such agreements were otherwise proscribed; like California's Labor Code section 1153(c), it merely provided that such agreements were not prohibited by state law. (See 431 U.S. at 214, n. 17.) It thus appeared to the dissent that the Abood majority had relied upon the Hanson analysis because, as in Hanson, the union security agreements at

issue were authorized by statute; Justice Powell would distinguish between permissive legislation and mandatory legislation.

The majority responded to the dissent's concern by expressly disavowing his construction of their reasoning. Hanson was applicable, the majority said, not because it found state action pursuant to the RLA, but because -- having found governmental action in the conflict between the RLA and the Nebraska statute -- the constitutional analysis of the union security agreement was relevant to the analysis in Abood:

> Nothing in our opinion . . . indicates that private collective-bargaining agreements are, without more, subject to constitutional constraints [citation to Justice Powell's opinion]. We compare the agency shop agreement in this case to those executed under the Railway Labor Act simply because the existence of governmental action in both contexts requires analysis of the free expression question.

(431 U.S. at 225, n. 23.)

Thus, this Court expressly eschewed

any suggestion that the result in Abood would have been the same whether or not the employer was a public entity. Indeed, in view of the vigor with which the majority answered the dissent's concern, it would not be unreasonable to conclude that the majority would have reached a different result had the employer been a private party operating under Michigan's permissive statute. It is thus true that the Abood court found no constitutional distinctions between the First Amendment rights of public and private sector employees; this is so, however, only when governmental action has resulted in a deprivation of constitutional rights to the private sector employee. Though governmental action was the source of the alleged deprivation in the Hanson case, it is not the source of Pasillas' grievance here.

In any event, the expressed and unequivocal disavowal by the majority in footnote

23 of the Abood decision makes abundantly clear that Abood is of no help to Pasillas in this case. And, although the Ninth Circuit has yet to comment on footnote 23, the Court of Appeal for the District of Columbia Circuit -- citing footnote 23 in Abood -- has expressly ruled that "the authorization for agency shop clauses provided by NLRA section 8(a)(3) does not transform agency shop clauses into a right or privilege created by the state or one for whom the state is responsible." (Kolinske v. Lubbers (D.C. Cir. 1983) 712 F.2d 471; see also Reid v. McDonnell Douglas Corporation (10th Cir. 1971) 443 F.2d 408.) The only contrary decision actually analyzing state action under the NLRA is Linscott v. Miller Falls Co., supra 440 F.2d 14. And, as the California Court of Appeal noted, the Linscott majority opinion issued before the 1977 Abood decision of this Court which made clear that the state action in

Hanson depended on the preemptive aspect of the RLA. The NLRA of course does not preempt any contrary state authority prohibiting union shops; it is a passive statute much like the ALRA.[3/]

CONCLUSION

There being no state action here, the sole issue in the underlying ALRB proceeding was whether the UFW's membership rule -- which requires union members to respect

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3. Pasillas also cites Ellis v. Brotherhood of Railway Clerks (1984) ___ U.S. ___ [104 S.Ct. 1883] for the proposition that this Court has decided the state action question. Ellis, decided under the Railway Labor Act, arose in California where, as noted, no conflicting "right-to-work" statute exists. The conflict noted in the Hanson case is therefore not present; this Court nonetheless addressed several constitutional issues. However, as the California Court of Appeal noted, neither the Ninth Circuit, which merely assumed the Hanson case applied, nor this Court actually addressed the issue of state action. Ellis does not therefore appear to be controlling on the issue. Furthermore, Pasillas' interpretation of the Ellis decision is at odds with a long line of previous federal authority, none of which was discussed in the Ellis opinion.

union picket lines -- is "reasonable" as contemplated by California Labor Code section 1153(c). This is obviously an issue of purely local concern, and one which the state administrative body and state courts have already addressed. In addition, since no state action is present, the California Court of Appeal did not find it necessary ~~reach appellant's other constitutional~~ issues. Appellee Agricultural Labor Relations Board therefore respectfully moves this Court to affirm the decision of the California Court of Appeal, First Appellate District in Pasillas, et al. v. Agricultural Labor Relations Board (1984) 156 Cal.App.3d 350.

Dated: December 5, 1984

Respectfully submitted,

DANIEL G. STONE
Solicitor of the Board
NANCY C. SMITH
Deputy Solicitor
CATHY A. CHRISTIAN
Deputy Solicitor

Counsel of Record

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 84-739

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SEVERO PASILLAS,

Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

Appellee.

On Appeal from the California Court of Appeal, First Appellate District, Division Two

APPELLANT'S OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

ROBERT F. GORE, Esquire
Counsel of Record
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

A. ROGER JEANSON, Esquire
Haas & Najarian
530 Jackson Street, Suite 303
San Francisco, California 94133
(415) 788-6330

January 4, 1985 Attorneys for Appellant

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No. 84-739

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SEVERO PASILLAS,

Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

Appellee.

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

The underlying issue in this case is whether the union-security agreement between appellant's employer and the United Farm Workers of America—negotiated pursuant to § 1153(c) of the California Agricultural Labor Relations Act (ALRA), CAL. LABOR CODE § 1153(c)—deprives the appellant (and other farm workers) of fundamental rights guaranteed by the Constitution of the United States. (Second Question Presented in Appellant's Jurisdictional Statement.) However, since most rights secured by the Constitution are protected only against infringement by governments, the threshhold issue is whether there is sufficient GOVERNMENTAL ACTION to trigger constitutional scrutiny of an ALRA-sanctioned union-security agreement negotiated by private parties. (First Question Presented in Appellant's Jurisdictional Statement.)

Appellant Severo Pasillas submits this short Reply Brief to correct certain misconceptions created by the Appellees' Motions to Dismiss or Affirm regarding the First Question Presented, i.e whether there is sufficient STATE ACTION to trigger constitutional scrutiny.

Appellees contend that since the common law of California did not restrict the rights of employers and labor unions to require full union membership, the 1975 codification of the common law into the ALRA did not constitute sufficient STATE ACTION to subject the new statute to constitutional scrutiny under the Fourteenth Amendment. Additionally the appellees contend that the ALRA's union-security authorization is passive and the STATE does not require that farm workers become and remain union members in good standing. In their view, compulsory union membership results from the actions of private parties, not from State action. Accordingly, appellees contend that the California Court of Appeals was correct in not addressing the Appellant's constitutional challenge to the statute.

What the appellees fail to acknowledge is that the enactment of the ALRA did far more than codify California's common law regarding union-security agreements. Under the California common law, employees did not have any right to refrain from joining or supporting a labor union—their employer could compel them to become full members of a labor union, even if that union did not represent a majority of the workers! Since the State was not involved in these actions by private parties, constitutional analysis would have been improper. However, when the STATE LEGISLATURE enacted the

ALRA in 1975, it granted farm workers rights they did not possess under the common law. Section 1152 of the Act provided that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and
>
> shall also have the *right to refrain* from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of § 1153.

LABOR CODE § 1152 (emphasis supplied). Section 1153(c) of the ALRA then went on to authorize labor unions—which had been *certified* as the exclusive bargaining representative by the California Agricultural Labor Relations Board (ALRB)—to negotiate agreements requiring that farm workers, in order to retain their jobs, become and remain union members in good standing. The statute defined membership as "the satisfaction of all *REASONABLE* terms and conditions uniformly applicable to other members in good standing." LABOR CODE § 1153(c) (emphasis supplied). Finally, under this statutory system, it was left to the STATE AGENCY (the ALRB) to decide which "terms and conditions of membership" were REASONABLE under the statute.

From this brief description of the statute, it is abun-

dantly clear that the ALRA did far more than codify the California common law regarding union-security. It granted farm workers rights they did not possess under the common law. It created a STATE AGENCY to conduct farm worker elections and certify the winner. It then authorized the STATE "certified" representatives to negotiate "membership in good standing" agreements. Finally, the statute authorized the STATE AGENCY to determine which "terms and conditions" of union membership were REASONABLE. The enactment, enforcement and operation of this statute has significantly changed the common law of California; and there can be little doubt that there is sufficient STATE ACTION to subject the statute to constitutional scrutiny. This case does *not* involve the private misuse of a State statute but rather challenges "the procedural scheme created by the statute which is obviously the product of STATE ACTION." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 2756 (1982) (emphasis supplied).

One final point should be noted. The ALRB, in its Motion to Affirm, repeatedly points out that the union-security authorization contained in § 1153(c) is *permissive* and not *mandatory* and "does not involve the government in the decision of a labor organization and an employer to negotiate union-security agreements." ALRB Motion to Affirm, p.6. Although the statute does not *require* that the STATE AGENCY become involved in the decision to negotiate a union-security agreement, this STATE AGENCY, in enforcing the statute, has consistently held it to be an unfair labor practice for an employer to refuse to agree to "membership in good standing" agreements. *See, e.g., Montebello Rose Co.*, 5

A.L.R.B. No. 64 (1980); *J.R. Norton Co.*, 8 A.L.R.B. No. 89 (1982). Thus for all practical purposes, the STATE has compelled the employers to agree to compulsory unionism agreements or subject themselves to significant make-whole remedies. The ALRB's attempts to characterize itself as a passive, disinterested party should be rejected—this STATE AGENCY has been deeply involved in ensuring that the maximum number of farm workers become and remain union members.

CONCLUSION

Based on the discussions above and those contained in the original Jurisdictional Statement, as well as those contained in the companion case of *Navarro v. Agricultural Labor Relations Board* (Docket Number 84-746), the Appellant Severo Pasillas requests that this Court EITHER

- note Probable Jurisdiction and set the case for argument OR
- dismiss the appeal with directions that the federal district court continue addressing the federal constitutional claims in *Beltran v. California*, Southern District of California, Case No. 83-0722 JLI(I).

Respectfully submitted,

ROBERT F. GORE, Esquire
Counsel of Record
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

A. ROGER JEANSON, Esquire
Haas & Najarian
530 Jackson Street, Suite 303
San Francisco, California 94133
(415) 788-6330

January 4, 1985

Attorneys for Appellant